Nos. 74-6257, 75-5394, 75-5491, 75-5706 and 75-5844

In the Supreme Court of the United States

OCTOBER TERM, 1975

FILED
MAR 25 1976
MICHAEL RODAK, JR., CLERK

TROY LEON GREGG, PETITIONER

v.

STATE OF GEORGIA

JERRY LANE JUREK, PETITIONER

v.

STATE OF TEXAS

JAMES TYRONE WOODSON AND LUBY WAXTON, PETITIONERS

v.

STATE OF NORTH CAROLINA

CHARLES WILLIAM PROFFITT, PETITIONER

v.

STATE OF FLORIDA

STANISLAUS ROBERTS, PETITIONER

v.

STATE OF LOUISIANA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA, THE COURT OF CRIMINAL APPEALS OF TEXAS, AND THE SUPREME COURTS OF NORTH CAROLINA, FLORIDA AND LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of January 22, 1976.

QUESTION PRESENTED

The United States will address the question whether the death penalty is always or inevitably cruel and unusual punishment within the meaning of the Eighth Amendment.

INTEREST OF THE UNITED STATES

Petitioners argue that the death penalty is unconstitutional because it is excessively cruel and because it is invariably applied arbitrarily. Acceptance of either argument will affect, if not decide, the validity

of any death penalty statute, whatever the crime and however the statute is framed.

The United States believes that imposition of the death penalty may sometimes be a necessary and appropriate measure to achieve the traditional goals of criminal justice. At the time this Court decided *Furman* v. *Georgia*, 408 U.S. 238, no fewer than 13 federal statutes provided for capital punishment, at the discretion of the jury, for certain crimes.[1] The validity of all of these statutes was called into question by *Furman*. Congress then enacted a statute providing the death penalty for aircraft piracy that results in death. 49 U.S.C. (Supp. IV) 1472 and 1473, 88 Stat. 410-413 (reprinted in Appendix C, *infra*). This statute places substantial constraints upon the discretion of the jury. The court must impose death if the jury finds that at least one of a specified

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[1] See 10 U.S.C. 856 (punishment upon conviction by court-martial); 18 U.S.C. 34 (destruction of aircraft or motor vehicle when death results); 18 U.S.C. 351 (assassination of a member of Congress); 18 U.S.C. 794 (espionage); 18 U.S.C. 1111 (murder within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. (1970 ed.) 1201 (kidnapping that results in death); 18 U.S.C. 1716 (mailing prohibited articles when death results); 18 U.S.C. 1751 (assassination of the President); 18 U.S.C. 1992 (wrecking a train when death results); 18 U.S.C. 2031 (rape within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 2113(e) (bank robbery that leads to death or kidnapping); 18 U.S.C. 2381 (treason); 49 U.S.C. (1970 ed.) 1472 (aircraft piracy). We previously have argued that, because of the important differences between the civilian and the military justice systems, 10 U.S.C. 856 was not invalidated by *Furman*. See Brief for the respondent in *Schick* v. *Reed*, No. 73-5677, October Term, 1974.

group of aggravating factors exists and that none of a specified group of mitigating factors exists. Under any other circumstances the court must impose life imprisonment. The government bears the burden of proving the existence of an aggravating factor. This statute is similar to the Florida statute now before the Court.[2]

Congress has under consideration other bills that would authorize the death penalty in different circumstances. See, *e.g.*, S. 1, 94th Cong., 1st Sess. (1975), the proposed revision and recodification of the federal criminal code, which is pending in the Senate Judiciary Committee. Sections 2401 and 2402 of S. 1, which provide for capital punishment, are

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[2] The Florida statute allows a jury to "balance" certain listed aggravating and mitigating factors. It also allows the trial judge to discard the jury's findings. Because 49 U.S.C. (Supp. IV) 1473 provides that the presence of any mitigating factor precludes the imposition of a death sentence, outcomes are more certain than are those under the Florida statute. See also pages 93-99, *infra*. The Texas and Georgia statutes, although structuring and confining the exercise of the jury's discretion, are dissimilar to the federal statute and to each other. Texas law provides that the death penalty will be imposed (for authorized crimes) if and only if the defendant's acts deliberately created an excessive risk of death, the defendant is likely to commit additional crimes unless incapacitated, and the crime for which he was convicted was unprovoked. Georgia law provides that the death penalty will be imposed (for authorized crimes) only if the jury finds that at least one aggravating circumstance was present and only if the jury does not recommend mercy. For a typology of these and other post-*Furman* statutes see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974).

supported by the President and are reprinted as Appendix D to this brief.

Although we do not specifically address the approach of the Antihijacking Act of 1974, S. 1, or any particular alternative approach, the United States has an important interest in this case because the Court's decision could affect the validity of every alternative approach and, if petitioners' arguments are accepted, render the death penalty *per se* unconstitutional.

SUMMARY OF ARGUMENT

The death penalty is a traditional sanction for those offenses society considers the most dangerous. Whether that penalty is necessary, or even appropriate, in a particular case is a judgment properly left to the representatives of the people and to the judges and juries who must decide whether to impose society's ultimate sanction. We submit that it is inappropriate for this Court to substitute its judgment about the propriety of the death penalty for that of the legislatures both more properly charged with the duty of making that judgment and more advantageously situated to collect and assess the relevant information.

We will not recount the positions taken by all nine members of this Court in *Furman* v. *Georgia*, 408 U.S. 238. Our argument is limited to those aspects of the capital punishment controversy that concern the propriety of this Court's exercise of power to nullify the considered judgments of the legislatures in 35 states, and of Congress, that capital punish-

ment is a legitimate response to certain crimes. We do not discuss the constitutionality or the propriety of any particular laws; instead we argue that neither the harshness of the penalty, nor the procedures necessarily used to administer it, render capital punishment unconstitutional *per se*. Judicially ascertainable changing standards of decency and the discretion built into our criminal justice system do not operate to make all death penalties cruel and unusual punishment.

I

The Constitution mentions capital punishment in four places, demonstrating that the framers intended to permit its use. At the time the Eighth Amendment was approved by the states capital punishment was a common sanction for serious crimes. The first Congress provided for use of the death penalty. If the meaning of that amendment were fixed by the practices in use at the time of its adoption, the outcome of this case would not be in doubt. But even if the cruel and unusual punishments clause must also be considered in light of the evolving standards of decency that mark a maturing society, the history of the amendment provides guidance to the understanding of how contemporary standards are to be evaluated, and how they are to be weighed against competing social goals.

The cruel and unusual punishments clause first appeared in the Bill of Rights of 1689, a reaction by Parliament to the excesses of the Stuart courts, and particularly to Lord Chief Justice Jeffreys, who

invented new combinations of punishments, not authorized by Parliament, and applied them in unusual fashions against the King's enemies. At the time the cruel and unusual punishments clause first appeared, drawing and quartering, and burning alive, were the usual methods of execution in England, and apparently were unaffected by the new clause. The clause appears to have been one chapter among many in the long struggle between King and Parliament to allocate the right to govern—cruel punishments were to be forbidden unless authorized by Parliament. The clause did not, however, restrict the power of Parliament to invent or prescribe punishments appropriate to an offense.

The clause was adopted in the United States with little debate, and we therefore cannot know whether the framers intended to adopt the clause with its English meaning. There is some evidence in the debates that it was directed against "barbarous" punishment that would amount to "torture." Others who originally had called for such a clause were concerned about the potentially unbridled punishing power of Congress. We can conclude from these debates that the American cruel and unusual punishments clause, unlike the English, binds legislators as well as judges. But nothing in the debates supports an inference that the framers thought that capital punishment, accepted as legitimate elsewhere in the Constitution, would be prohibited.

II

This Court's Eighth Amendment decisions have established the principle that the cruel and unusual punishments clause prohibits punishments that lie outside the bounds of tolerable social behavior. But all of the cases that have held punishments unconstitutional under the clause have dealt either with a strange form of punishment not used in American law (see, *e.g.*, *Weems* v. *United States*, 217 U.S. 349) or punishment applied to a "status" to which no penalty, however light, could attach (*Robinson* v. *California*, 370 U.S. 660). In each case involving the former category, it has been necessary to ascertain the limits established by the social consensus, and then to determine whether they have been transgressed. It also has been helpful to determine the reason why society had not rid itself of the apparently aberrant punishment without the need for judicial intervention.

When a penalty is enacted by a legislature and imposed only by a unanimous jury, the sanction is very unlikely to be outside the bounds of social tolerance. In our form of democracy the will of the people is expressed through their representatives. Since this Court's decision in *Furman* v. *Georgia* at least 35 states and the United States have enacted new statutes providing for the death penalty. We submit that it is utterly implausible that so many legislatures can, time and again, fail to reflect the will of the people concerning capital punishment. Were this Court to hold the death penalty unconstitutional, it would have to conclude that it—whose justices are not elected and have been given life tenure in order to insulate them from popular and political opinion—is more conscious of and more responsive to the will of the people than are the representatives directly elected by and responsible to those people. Petitioners seek a referendum among judges as a proxy for the "true" will of the people. But if the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives and through juries—must sit in judgment.

To the extent the constitutionality of capital punishment depends not only on the limits of current social tolerance, but also on the nature of the purposes served by the sanction, we submit that capital punishment serves important and legitimate purposes. Because capital punishment is society's "ultimate" sanction, it is likely to have a stronger effect as a deterrent than do alternative sanctions. Two recent studies of the deterrent efficacy of the death penalty support this intuitive conclusion. Other studies of the death penalty are infected by serious analytical flaws, and so do not provide support for a contrary conclusion. But quite aside from empirical studies, the legislature is entitled to credit the logical argument that capital punishment deters crime because it is society's most severe sanction. This alone is sufficient to satisfy any constitutional requirement that the death penalty serve important social purposes.

Capital punishment of course has other purposes as well. The death penalty serves a vital function

as society's expression of moral outrage, and marks off some crimes as so repulsive that they are to be avoided by those individuals with even a trace of social responsibility. Some crimes, too, are so vicious, so offensive to society's standards of decency, that they call out for an ultimate sanction in order to reinforce the social feeling of revulsion to acts of that character. This response—retribution perhaps, although without vindictiveness—has been endorsed by respected commentators and seems an essential ingredient of a healthy society.

Finally, capital punishment incapacitates some individuals who, if allowed to remain alive, would be so immune to normal forms of social control that they would continue to commit murders even if sentenced to life imprisonment without possibility of parole. The federal prison system now confines at least one man who, since his incarceration for murder, has committed and been convicted of murders within prison on three separate occasions. This man, and others like him, will find opportunities to kill again, regardless of the care taken to guard them, and we submit that the Eighth Amendment does not compel society to grant them those opportunities.

Although there may be legitimate differences of opinion regarding capital punishment's propriety and utility in modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders, those differences of opinion are to be resolved by the legislature. The legislative judgment on these matters should be ac-

cepted by the judicial arm. Once the Court has satisfied itself that there is support for the legislature's decision, its role has been exhausted. An omniscient observer might conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate, but the data such an observer would use, and the standards he would apply when weighing the moral values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. The judgment of a legislature that capital punishment is necessary and appropriate is based on its evaluation of unsettled empirical and moral questions, and its resolution of those questions should not be cast aside.

Several of the Justices who concurred in *Furman* advanced empirical arguments that led them to a different conclusion. But the validity of these arguments is now open to question. The response of state legislatures, and of Congress, to *Furman* has demonstrated that the legislative will is frustrated unless the death penalty is imposed upon some individuals. The same legislative response has established that capital punishment is "necessary" in our society to achieve articulable and rational goals. And some legislatures have been willing to impose capital punishment with considerable frequency.

III

Beyond these considerations, it is important to note that no pattern of racial discrimination in the imposition of the death penalty for murder has been shown, and apparently none can be shown. Although

blacks are sentenced to death at an apparently high rate, they also commit a disproportionate share of the capital crimes. Nearly 60 percent of those arrested for willful homicide are black, a proportion very close to the ratio of blacks to whites among those sentenced to death. Much of the argument here asks the Court simply to assume the existence of racial discrimination. But no such assumption is justified by the available data, and the most recent study indicates the absence of discrimination.

IV

We agree with petitioners that the process by which the criminal justice system operates, involving charging discretion, plea bargaining, the jury's ability to acquit, and executive clemency, involves discretion that will be with us so long as we have a system of criminal *justice*. But the inevitable presence of such discretion cannot render the death penalty unconstitutional—indeed, it is an odd argument to make, because it requires the Court to conclude, although the Eighth Amendment does not of its own force bar death as a form of punishment, that the death penalty can never be imposed under the criminal justice system established by our Constitution. To the extent it is a challenge against discretion in the criminal justice system, the argument assails that discretion as applied to all crimes, whether or not a death penalty results. Every argument petitioners make is equally applicable to life imprisonment.

Petitioners' argument also is odd because it is cast in Eighth Amendment rather than in Fifth Amendment terms. We would suppose that if a court were concerned with the procedures by which capital punishment is imposed, the appropriate avenue of inquiry would be the Fifth Amendment's command that no person may be "deprived of life * * * without due process of law." That, of course, was the argument in *McGautha* v. *California*, 402 U.S. 183, with respect to jury discretion, and the Court rejected it. The argument should be cast in that form here as well. Some of petitioners' contentions—such as the claim that laws providing for capital punishment often are too vague to enable the jury to decide when such a crime has been committed, or that plea bargaining offers opportunities for discrimination—are particularly appropriate candidates for such narrow presentation. The vagueness doctrine is well defined, and excessively vague statutes may be set aside without calling into question the ability of the legislature to provide for capital punishment. Similarly, racial or other invidious discrimination occurring in plea bargaining, or at other stages of the criminal justice system, is unconstitutional and may be challenged directly. But this is not an argument against the imposition of the death penalty by a criminal justice system that does not so discriminate. No one would argue that because juries might unlawfully discriminate, juries should be abolished. Similarly, if, as we argue, the death penalty is not a forbidden type of punishment, it cannot be abolished

on the basis that some individuals might seek to impose it for invalid reasons. The same can be said for any punishment.

As for the remaining avenues of discretion, each is either required or encouraged by the Constitution itself. The prosecutor's unfettered discretion to decline to prosecute is largely a product of the separation of powers in our constitutional system. It is a discretion necessary to enable the prosecutor to fulfill his duty under the Due Process Clause not to prosecute an individual unless there is a reasonable prospect of conviction.

Plea bargaining has been approved by this Court, which has stated that it is to be "encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260. Moreover, plea bargaining, like the other sources of discretion assailed by petitioners, operates in favor of an accused, and (unlike some other sources of discretion) only at his behest. An individual need not engage in such bargaining unless he believes it will be advantageous.

The power of a jury to acquit despite evidence justifying conviction derives from and is protected by the Sixth Amendment right to trial by jury, and the same provision creates the jury's right to convict of lesser included offenses (again at the behest of the accused) if it finds facts that make such a conviction appropriate.

The power of the judge and jury, acting under statutory guidelines, to select between sentences of death or life imprisonment involves far less discre-

tion than the standardless discretion upheld against constitutional challenge in *McGautha*, *supra*. In any event, most of petitioners' challenge to this discretion is in reality an argument that the statutory criteria are unconstitutionally vague. That argument has nothing to do with the constitutionality of capital punishment, for vague statutes can be construed or appropriately amended.

Finally, the power of the executive to grant clemency is established by the Constitution, and as this Court recently held (*Schick* v. *Reed*, 419 U.S. 256) it is an unfettered power because the essence of mercy is discretion.

In the last analysis, petitioners seek to convince this Court that procedures required or encouraged by one part of the Constitution inevitably produce a result forbidden by the Eighth Amendment. But the Eighth Amendment requires no such result, and, to the extent there is any leeway in construction, the Amendment should be read in a manner that makes it harmonious with, rather than antagonistic to, the remainder of the Constitution. The Court should not rule that although the process and procedures used imposing the death penalty are constitutionally permissible, indeed in many instances compelled, the death penalty is nevertheless unconstitutional under the Eighth Amendment *because* of those very processes and procedures. Yet that, we submit, is the essence of petitioners' argument in this regard.

ARGUMENT[1]

I. THE ORIGINS OF THE EIGHTH AMENDMENT SHOW THAT A LEGISLATURE MAY CONSTITUTIONALLY PROVIDE FOR CAPITAL PUNISHMENT

A. The Text Of The Constitution Demonstrates That The Framers Intended To Allow Capital Punishment

The Fifth Amendment, adopted at the same time as the Eighth, shows that the framers of the Constitution contemplated the continued use of capital punishment. That sanction is addressed three times in the Fifth Amendment's requirement of a presentment or indictment by a grand jury in capital cases, its prohibition of double jeopardy of life, and its requirement that there be due process of law in deprivation of life. It is, of course, impossible that the framers intended the Eighth Amendment to ban a punishment while simultaneously specifying the procedural safeguards for the infliction of that punishment. The Fourteenth Amendment, adopted just over three quarters of a century later, also contemplates the validity of the capital sanction, providing that no state shall deprive any person of "life, liberty, or property" without due process of law.[4]

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[1] This brief augments the arguments we made in our brief *amicus curiae* in *Fowler* v. *North Carolina*, No. 73-7031. Further reference to our *Fowler* brief consequently is unnecessary.

[4] Indeed, the cruel and unusual punishments clause of the Eighth Amendment applies to the states only through the due process clause of the Fourteenth Amendment. It would be anomalous if the clause specifying the means by which a state can deprive a person of "life" should now be held to forbid such a deprivation entirely. Cf. *Richardson* v. *Ramirez*, 418 U.S. 24.

The clear lesson of the text concerning the framers' intention is supported by history. At the time the Eighth Amendment was ratified by the states, capital punishment was a common sanction in every state for serious crimes. There is nothing in the debates accompanying its adoption to indicate any anticipation that the Eighth Amendment would, either immediately or in the future, prohibit the imposition of capital punishment. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for a variety of offenses. 1 Stat. 112.

B. For Nearly Two Centuries The Eighth Amendment Was Understood To Allow Capital Punishment

For nearly two centuries this nation justifiably assumed that the death penalty was a permissible sanction, to be imposed according to statute—a sanction legislatures could choose as the necessary and appropriate response to certain criminal activity. This consensus was so complete that the constitutionality of the death penalty never directly came before this Court. Because no Justice believed that the penalty itself was improper, it was unnecessary even to discuss the proposition. Cases turned simply on the manner of its imposition. See *Wilkerson* v. *Utah*, 99 U.S. 130 (death by public shooting not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (death by

electrocution not cruel and unusual); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (death by repeated electrocutions not cruel and unusual); *Trop* v. *Dulles*, 356 U.S. 86, 99 (dictum). Cf. *Weems* v. *United States*, 217 U.S. 349, 382, 409 (White, J., joined by Holmes, J., dissenting); *McGautha* v. *California*, 402 U.S. 183, 226 (opinion of Black, J.). See also *Storti* v. *Commonwealth*, 178 Mass. 549 (Holmes, C.J.).

If the meaning of the Eighth Amendment were fixed by the intentions and practices of its framers, the outcome of this case would not be in question. However, this Court has concluded that the legality of a penalty under the Eighth Amendment must also be considered in light of the changing standards of decency that mark an evolving society. *Weems* v. *United States*, *supra*; *Trop* v. *Dulles*, *supra* (plurality opinion). If the cruelty and the unusualness of a penalty is to depend in part on the changing standards of decency in society, so that the amendment is, to that degree, a barometer of contemporary "social conscience" as well as a reflection of historical traditions, it is necessary to know how contemporary standards are to be evaluated, and once evaluated, how this data is to be weighed. Nevertheless, one thing is certain: the historical background of the Eighth Amendment must be consulted in order to determine the meaning of "cruel and unusual punishments." History may not completely fix the meaning of the Constitution, but it sets limits, and the words used by the framers acquire scope and function from the events they summarize. See generally *United States* v. *Watson*, No. 74-538, decided January 26, 1976; *Ex parte Grossman*, 267 U.S. 87, 108-109; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 655-656.

C. The English Experience

Until the late 1600's England had developed no general prohibition against cruel, barbarous or illegal punishments. The Magna Carta forbade excessive punishments, but "excessive" meant death for a trifling offense. Holt, *Magna Carta* 323 (1965); cf. Barrington, *The Magna Charta and other Great Charters of England* 181, 199 (1900). The criminal law was severe and unyielding; even though some charters reserved great punishments for "great" crimes, most thefts were felonies, and felonies were capital offenses. 1 Stephen, *History of the Criminal Law in England* 457-492 (1883). The slogan, often accepted even in the seventeenth century, that "the punishment should fit the crime" (see Perry, *Sources of Our Liberties* 236 (1959)) simply meant that, however much greater the punishment than the harm inflicted by the crime, some measure of proportionality was necessary, and a comparison to other authorized punishments appropriate.

The phrase "cruel and unusual punishments" was first used in the Bill of Rights of 1689, drawn up by Parliament as part of the accession of William and Mary. Perry, *supra*, at 247. Most historians have attributed this clause to Parliamentary reaction

to the "Bloody Assize" of 1685, a series of treason trials held after the abortive uprising by the Duke of Monmouth. See generally Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839, 852-860 (1969) (which questions this attribution).

Monmouth's rebellion was an attempt to overthrow King James II. Monmouth was defeated and the king appointed Chief Justice Jeffreys of the King's Bench to a special assize to try the captured rebels. Because of the number of treasonous prisoners a series of trials would have been lengthy and complicated; Jeffreys undertook to simplify his task by engaging in plea bargaining. Those who pleaded guilty were promised that their lives would be spared; many did so, but James II and Jeffreys reneged on the bargain and executed many of the prisoners the next winter. After James II had fled, Parliament reacted to the Bloody Assize of the previous year with proposals to secure the people against the "illegal and cruel" punishments inflicted by such special (and unauthorized) tribunals. See Somers, *A Vindication of the Late Parliament of England* 3 (1690).[5]

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[5] The methods of punishment used by the Bloody Assize were not "cruel" within the English experience. The rebels were hanged, cut down and disemboweled while alive, drawn and quartered. Females were burned while alive. But the punishments were imposed by a royal tribunal, free of Parlimentary control or authorization. To that extent they were unauthorized. And, of course, because many of the executions were in violation of the original pleas and judgments, they were "illegal."

Granucci, on the other hand, attributes the cruel and unusual punishments clause of 1689 to the history of Titus Oates and the "Popish Plot" of 1678-1679. Granucci, *supra*, at 856-860. The "Popish Plot" was a ruse by Oates to convince his countrymen that Catholic agents would assassinate Charles II and place the Catholic James II on the throne. Oates swore to the fictitious "plot" and in the ensuing commotion 15 Catholics were tried and executed.

Oates' perjury was exposed after the succession of James II, and Oates himself was tried and convicted by the King's Bench, Chief Justice Jeffreys presiding, and sentenced to a fine, life imprisonment, whippings, defrocking, and to pillorying four times yearly. The House of Lords upheld the judgment, but the Commons intervened on behalf of Oates, on the basis that this punishment was inhumane and illegal because not authorized by Parliament. The objection again was that the combination of pains and penalties had never been authorized as a response to the crime of perjury, and that the court was without jurisdiction to impose it, even though life imprisonment, whippings and pilloryings were common sanctions both singly and in combination, and could not, in the seventeenth century, have been thought "excessive" for a crime that had sent 15 innocent people to their deaths.

The English history of the prohibition of cruel and unusual punishments, therefore, supports at most a prohibition against punishments unauthorized for the

crime, and against egregiously disproportionate punishments for nonfelony offenses. The prohibition did not restrict the punishing power, nor did it limit punishments to those minimally "necessary" in light of the crime. Parliament was attempting to bridle the King's courts;[6] there is no hint that Parliament was attempting to inhibit its own judgments or was authorizing the courts to do so.[7] The Bill of Rights of 1689 did not secure the liberties of the people. It was simply another tool in the extended struggle between Parliament and King to allocate the power to govern.

D. The United States' Derivation of the Clause

The debates at the time of the adoption of the Eighth Amendment reveal little about the framers' understanding of its origins or meaning. The Senate debates on the amendments were closed entirely (Goebel, *History of The Supreme Court of the United States, Vol. I: Antecedents and Beginnings to 1801*

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[6] The preamble to the Bill of Rights of 1689 stated that James II and his courts were arbitrarily "assuming and exercising the power of dispensing with and suspending of laws and the execution of laws, without consent of parliament." The King had claimed such power. See Kenyon, *The Stuart Constitution 1603-1688*, 420-426 (1966).

[7] Cf. *Martin* v. *United States*, 317 F.2d 753, 755 (C.A. 9): "[I]t is well settled that a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment * * *." Even in 1769 Blackstone believed that cruel and excessive punishments were controlled only by the "tacit consent" of the people, 4 Blackstone, *Commentaries on the Laws of England* 369-373 (1769), and that the Bill of Rights of 1689 did not constrain Parliament.

444 (1971)) and little was said about the clause in the recorded debates.

The materials available from colonial times are not sufficiently comprehensive to enable historians to ascertain the source of most of the amendments that comprise the bill of rights. Professor Goebel has speculated that the proposed amendments were compiled in a grab-bag fashion from lists of rights that were known to the colonies from treatises on English law and had, in one fashion or another, become part of the law of one or more of the colonies. See also Levy, *The Origins of the Fifth Amendment* 411 (1968). The cruel and unusual punishments clause of the Eighth Amendment was taken verbatim from the English Bill of Rights of 1689, although several of the colonial constitutions had similar provisions.

Its insertion may well have been prompted by complaints in the state ratifying conventions that the Constitution contained no limits on the methods of federal punishment. For example, in the Massachusetts convention of January 1788, an objection was made that

> [Congress will] have to ascertain * * * and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check of them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline. [2 Elliot, *The Debates in the Several*

State Conventions on the Adoption of the Federal Constitution 111 (2d ed. 1836).]

See also *Furman, supra,* 408 U.S. at 320-321 (Marshall, J., concurring). In the Virginia debates Patrick Henry objected to the possibility of uncontrolled use of "tortures" and "barbarous" punishments, and George Mason explained that such punishments were prohibited in Virginia by the Virginia constitution's cruel and unusual punishments clause, which would forbid all "torture." 3 Elliott, *supra,* at 447, 452.

These expressions may indicate that the framers desired a clause that would bind legislators as well as judges; there is no contrary indication in the sparse debates in the House of Representatives. But the emphasis by those who objected to a lack of a cruel and unusual punishments clause was the need for a prohibition of "torture" or other barbarous forms of punishment, thus showing that legislatures were to continue to have considerable leeway in determining the scale of punishments to be used.

During the debates on the floor of the House only two representatives spoke to the cruel and unusual punishments clause. Mr. Smith of South Carolina believed that the clause was too "indefinite" and Mr. Livermore thought it unnecessary. Mr. Livermore went on to argue that some punishments (such as hanging, whipping and cutting off of ears) were "cruel" but necessary. 1 Annals of Congress 753-754 (1789).

It is difficult to interpret the vote in favor of the clause immediately after this objection. Because

hanging was an accepted penalty for crime at the time, and because the first Congress itself provided for capital punishment, it can be inferred that these early congressmen thought Livermore's interpretation of the clause not well taken; even though a punishment might be "cruel" in a general sense, it was not necessarily "cruel" in the constitutional sense and so not inevitably to be prohibited by the clause. In affixing individual responsibility, Congress would be permitted to use its judgment, weighing the inevitable cruelty of *any* punishment against the social need for it.

The amendment fell into desuetude after its adoption; cases rarely discussed it, and no penalty was held forbidden under it until *Weems* was decided in 1909. This was probably the proper fate for the amendment in light of its history, for the history discloses, to the extent it discloses anything, that the amendment was an attempt to guarantee against the new national government, concerning which many persons were apprehensive, a then-prevalent social consensus that some punishments were simply beyond the pale of civility. The apprehensions were not well-founded, and the guarantee, given our form of government, was largely (though, as we will show, not completely) unnecessary. Any such punishment would almost invariably be extinguished by the legislature before it could be tested in the courts. Were a punishment intolerable, it would be rejected by the people themselves—and that rejection would come not only by legislative repeal or alteration but also by the

refusal of juries to convict of crimes carrying the intolerable punishment. In this light, the amendment states a standard below which communities and their legislatures may not fall; it provides a safeguard against the aberrational case, in which the punishment imposed is profoundly and demonstrably contrary to prevailing standards of decency.

E. Judicial Construction

If the Eighth Amendment enforces the evolving standards of decency that mark a civilized society, the first task is to ascertain whether there is a particular social consensus concerning the practical and ethical values that pertain to punishment, and whether a particular punishment transgresses the limits established by that consensus. This Court's Eighth Amendment decisions have attempted to undertake such an inquiry, and have facilitated that investigation with an additional inquiry into the reasons why society failed to prevent the "intolerable" punishment without judicial intervention. If such a reason explaining the apparently deviant assessment of punishment is present there will be additional support for the judicial inference that those who have imposed the punishment—rather than those who sit in ultimate judgment—have misapprehended the social standards of decency.

In *Weems* v. *United States*, *supra*, this Court dealt with *cadena temporal*, a Philippine traditional punishment (for even petty offenses) that imposed 15 years' "hard and painful labor," the constant wear-

ing of chains, loss of all civil rights, and perpetual surveillance. The punishment failed the "consensus" test because it was not native to this country and never had been an accepted punishment for crimes here. The penalty, by all American standards, was patently harsh and disproportionate to the offense. Nor was it difficult to see why the consensus had failed to make itself felt without judicial intervention: the penalty had been invented by a foreign legislature and was imposed by a foreign judicial system unaccustomed to our sensibilities.

In *Trop* v. *Dulles*, *supra*, a plurality of this Court concluded that denationalization was cruel and unusual punishment. The power to denationalize a deserting soldier had been placed in the hands of military officials, and they had used it to strip citizenship from Trop, who had "deserted" for a single day and voluntarily surrendered. There, too, the consensus had failed. Denationalization was not a traditional American punishment for crime; it was (of course) not used by any state. The plurality concluded that citizenship is not subject to the general powers of Congress; Congress therefore could not authorize this admittedly unusual punishment whether or not it was appropriate—an issue the plurality thought irrelevant. Mr. Justice Brennan, concurring (356 U.S. at 105), agreed. Moreover, the Court highlighted the mechanism through which the social consensus had been avoided: the decision to denationalize had been removed from a jury, which could refuse to impose socially unacceptable punish-

ments, and had been placed in the hands of military authorities (a general court-martial convicts by less than unanimous vote and therefore is, for example, less likely to reject unacceptable punishments, and courts-martial are not designed to produce a cross-section of the civilian community). See the opinion of Mr. Justice Black, concurring, 356 U.S. at 104-105.

The use of the Eighth Amendment in *Robinson* v. *California*, 370 U.S. 660, varies somewhat from this pattern but is not inconsistent with it. In *Robinson* the Court did not hold that some particular penalty was cruel and unusual, but that *any* penalty for narcotic addiction would be cruel and unusual because a status, as distinguished from an act, could not be a crime. That is a decision different in kind from the decision to be made in these cases. *Robinson* decided that some things could not be made crimes, not that the legislature was forbidden to apply a particular penalty to a particular crime.

In other cases in which this Court has upheld specific penalties it has decided that the penalty itself did not overstep the tolerance of the social conscience. For example, in *Howard* v. *Fleming*, 191 U.S. 126, the Court rejected a claim that ten years' incarceration for conspiracy to defraud was cruel and unusual; the Court concluded that such a course had not been rejected by the people as barbarous or depraved, was accepted by many legislatures, and was not egregiously disproportional to the provocation. See also *Badders* v. *United States*, 240 U.S.

391; *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407.

The lower courts have, in the main, followed a similar course. They have approved legislatively prescribed penalties unless there was evidence that other jurisdictions rejected those penalties and, in addition, the penalties appeared to be so excessive that they are repulsive and unnecessary. See, *e.g.*, *United States* v. *Beverely*, 416 F.2d 263 (C.A. 9) (upholding the 25-year minimum sentence for aggravated mail robbery).[8]

Considerably less deference has been shown to punishments decreed or augmented by administrative officials; in such cases there are greater opportunities for individuals to impose punishments for which the representatives of the people would not vote and which society would not tolerate were the punishments known. The smaller the decision-making body, the more likely it is to err in its reading of the demands of the social mores and the less likely the penalty will be brought to public attention for correction. Moreover, to the extent punishment is imposed or augmented by administrative officials with-

[8] Following the same analysis, but reaching a different result, is *Hart* v. *Coiner*, 483 F.2d 136 (C.A. 4), certiorari denied, 415 U.S. 983, which holds that life imprisonment for petty recidivism is cruel and unusual because it has been rejected by almost all states. See also *Downey* v. *Perini*, 518 F.2d 1288 (C.A. 6), vacated and remanded for reconsideration, December 2, 1975, No. 75-219, which holds that 60 years' imprisonment for possession and sale of marijuana is cruel and unusual on a similar theory. Cf. Note, 44 Fordham L. Rev. 637 (1975) (collecting cases).

out specific sanction from the legislature, the responsibility for punishment has been removed from a body ultimately responsible to the people. There has, therefore, been a greater willingness to examine the potentially barbaric conditions created by isolated prison officials (see, *e.g.*, *Holt* v. *Sarver*, 442 F.2d 304 (C.A. 8); *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194 (C.A. 8)) or even by individuals within a prison system who act to deprive an inmate of medical care or protection from other aggressive inmates (see, *e.g.*, *Newman* v. *Alabama*, 503 F.2d 1320, 1330-1332 (C.A. 5)).

Because even at its broadest interpretation the cruel and unusual punishments clause protects against only those punishments utterly outside the bounds of social tolerance, it is not surprising that great deference should be shown to penalties selected by a legislature and enforced by the unanimous decision of a jury. In a representative democracy the legislature speaks for the people that elected it. Once enacted, the penalty cannot be imposed unless the people themselves, acting as a jury of the peers of the accused, agree to its imposition. And the jury, with its prerogative to "nullify" laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations.

Thus, if a penalty can pass the dual test of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not so cruel, disproportionate, or repulsive to the sensibilities of modern society that it

is forbidden by the cruel and unusual punishments clause. Those who would paint it so must make their case by clear and convincing evidence. They cannot call on this Court to sit as a "super-legislature" (*Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 534 (Brandeis and Holmes, JJ., dissenting)) and assess merely whether the legislature's decision was wise.[9]

II. THIS COURT SHOULD UPHOLD A PENALTY ENACTED BY A LEGISLATURE, SERVING LEGITIMATE PURPOSES, AND ACCEPTED BY CONTEMPORARY SOCIETY

If our analysis of the cruel and unusual punishments clause is correct, that clause forbids only penalties similar in nature to those the framers wished to forbid (a category certainly not involved here) or penalties that fall so far beyond the pale of social acceptability that they appear as aberrations. The clause is appropriately directed to such aberrations, in which, through a combination of circumstances (whether uninformed, accidental or malign), a punishment utterly unacceptable to society has been decreed or imposed. A solitary individual, whether he be legislator, prison administrator, judge or juror, could assess a penalty or create conditions offensive to contemporary standards of decency. But it is difficult to see how such a mistake, such a gross misunderstanding, can be made time and again by legislatures of the several states and the Congress,

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[9] See also *Ferguson* v. *Skrupa*, 372 U.S. 726, 731.

and by the juries that assess guilt with the knowledge of the potential penalties. There are too many participants in the process, too many individuals (including, as well, the prosecutor, grand jury, and governor or other clemency authority) *each* of whom would have to be ignorant of or flaunt society's demands, for it to be true that a legislatively enacted and judicially enforced penalty could constitute cruel and unusual punishment.

We do not claim that even this process can never err. It is conceivable that aberrant laws can be passed and aberrant juries found. But the challenge raised by petitioners is not a challenge to unusual or freakish events; most states provide for capital punishment, and in 1974 alone 151 individuals were sentenced to death. At the end of 1974 at least 254 individuals had been sentenced to death since *Furman* and were awaiting execution.[10]

How then can it be declared by this Court, by any court, that the death penalty contravenes evolving standards of decency or contemporary notions of human dignity or society's currently-held moral values? The framers of the Constitution "might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he would then have been ruler, like the Judges of

[10] Law Enforcement Assistance Administration, *Capital Punishment 1974*, p. 1 and Table 7, p. 26 (1975). As petitioner Jurek concedes, this is a "not inconsiderable" number. *Jurek* Br. 67-69, n.108. Cf. *id.* at 83-84, n.147 (discussing data collected by the NAACP, which shows 454 death sentences through February 25, 1976).

Israel." [11] The question cannot be avoided: if this Court were to hold that the death penalty violates evolving standards of decency, would not one then be required to conclude that 35 state legislatures and the Congress of the United States are unenlightened, that they are out of step with contemporary moral standards and the will and spirit of the people who elected them? Courts announce their view of society's standards of decency and, by doing so, encourage public acceptance of what can at best be only a prediction. But with respect to the death penalty the Court has previously spoken,[12] and it has seen the response.

This is not to say that a position espoused by an enlightened few is to be ignored. It is not. In all societies, in all ages, the ideas of those in a minority have influenced and inspired those in the majority. But this describes the legislative process, not the judicial. Only when a minority opinion has gradually made its way to acceptance by the society can we be sure that it was and is the enlightened view and not merely an unpopular and unpersuasive opinion. If judges anticipate the moral verdict of society, they will frequently anticipate incorrectly and fasten their own views upon the nation in the name of enlightenment. Such a theory of judicial power resembles too closely Rousseau's concept of the general will, which

[11] Learned Hand, "How Far is a Judge Free in Rendering a Decision?" (1935), in *The Spirit of Liberty* 109 (Dilliard ed. 1960).

[12] *Furman* v. *Georgia*, *supra*.

is entitled to govern even when possessed only by a minority, and is antithetical to the tenets of representative democracies. If, as the Eighth Amendment contemplates, the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives—must sit in judgment.

A. Capital Punishment Serves Legitimate Purposes

In enacting death penalty statutes, the legislatures throughout the country have not acted irrationally. Capital punishment serves several important social purposes, among which are deterring crimes and expressing society's moral outrage in a manner that shapes and reinforces the community's standards.

1. *Capital Punishment Deters Crime.*

There is an inherent logic to the belief that the death penalty deters at least some people from committing crimes. "Belief in the deterrent efficacy of penal sanctions is as old as the criminal law itself." Zimring & Hawkins, *Deterrence* 1 (1973). Just as some penalty deters a prospective offender by making the prospect of crime less attractive, so does a more severe penalty make crime still less attractive, and so less likely to occur.[13] Because death is per-

[13] There is strong empirical evidence that the threat of imprisonment deters crime (including murder) and that longer sentences are a more effective deterrent. See Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation,* 81 J. Pol. Econ. 521 (1973); Block and Lind, *An Economic Analysis of Crimes Punishable by Imprisonment,* 4 J. Legal Studies 479 (1975); Ehrlich, *The Deterrent*

ceived by most potential law breakers as the maximum feasible penalty, it is probably the most effective deterrent force. "*Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form a punishment * * *." Royal Commission on Capital Punishment, *1949-1953 Report*, ¶ 61 (1953). It is not unreasonable or insupportable for a legislature to credit an argument with such strong plausibility.

The primary arguments against the deterrent force of capital punishment are that criminals (by definition) are not "normal" people, and so do not respond in "normal" ways, and that many murders or other capital crimes are crimes of passion and hence not deterrable. Neither argument supports a conclusion that capital punishment does not have a deterrent effect. The only surface evidence that criminals are not "normal" is their failure to conform to some social "norms"; that evidence alone is not proof (or even support) for the proposition that "criminals" do not respond to incentives, to the prospect of pain or pleasure.[14]

We can conclude, perhaps, that those who do not obey the laws have little respect for the law *per se*,

Effect of Criminal Law Enforcement, 1 J. Legal Studies 259 (1972); Gibbs, *Crime, Punishment, and Deterrence,* 48 Sw. Soc. Sci. Q. 515 (1968). Other studies are collected in van den Haag, *Punishing Criminals* 130-142 (1975).

[14] Cf. Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 458-459 (1897) (it is the "bad man" whom the law regards as "normal," for only when a man is "bad" must the law depend on its threats of pain to change his behavior).

and in that sense lack a "normal" trait. But we cannot conclude that all criminals are completely insensitive to deterrence merely because they commit crimes; we can validly conclude only that they have evaluated the prospects of success (and the "cost" to them of apprehension) differently from those who have the propensity to offend but do not. See Packer, *The Limits of the Criminal Sanction* 40-45 (1968). Indeed, the efforts of most criminals to avoid detection, and to escape after being caught, show very clearly that they are sensitive to a calculus of pains and pleasures.

Similarly, although there are many crimes committed in such intense passion that the offender may altogether neglect to consider the prospect of punishment in the future, the existence of such people and such crimes of passion does not indicate that there are no deterrable crimes. Some murders are committed for money, some after lengthy contemplation. Treason, espionage, sabotage, aircraft piracy and deliberate wrecking of trains (all of them federal capital offenses) are prime examples of entire categories of offense committed after calculation and in pursuit of ulterior goals. The people who commit such crimes are rational (albeit misguided or evil) individuals, and there is no reason to believe they will not attend their own self-interest and consider the potential severity of the penalty that might be meted out in response. These crimes (at least) are sufficiently narrow and clearly defined, and sufficiently open to dissuasion by deterrence, that capital

punishment is permissible for them regardless of its deterrent value as applied to other crimes.[15] The death penalty could realistically be made a fully predictable response to these crimes, and those contemplating such criminal activity could be required to take into account a very great probability of execution if caught.

Moreover, although an individual may use a weapon in a fit of passion, the decision to carry a weapon at all is made with a cool head and (often) considerable forethought. The prospect that he will find himself unable or unwilling to control the use of that weapon may cause many people not to possess or carry it, and consequently decrease the number of "passionate" killings. Legislators may also legitimately conclude that many crimes committed in passion are deterrable even if some are not, and that the death penalty is appropriately applied to the entire category to save as many innocent lives as possible. The choice of crimes for which capital punishment is to be authorized is, unless indisputably aberrant and grossly disproportionate, a legislative choice.

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[15] The Supreme Judicial Court of Massachusetts recently struck down under the Massachusetts Constitution a pre-*Furman* death penalty statute. *Commonwealth* v. *O'Neal*, 339 N.E.2d 676. The Justices divided four to three on the constitutional question. Two of the four Justices in the majority expressly noted that capital punishment might well be constitutional for carefully described categories of clearly deterrable crimes. See 339 N.E.2d at 694 (Hennessey, J., concurring); *id.* at 695 (Wilkins, J., concurring).

Legislators are not alone in believing that the death penalty is a more effective deterrent than is life imprisonment. A recent study has tentatively concluded that when capital punishment was *actually used* a significant number of lives were saved: over the period studied, and after controlling for the effects of other variables, using the death penalty instead of imprisonment may have deterred approximately eight murders for each execution actually carried out. See Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 Am. Econ. Rev. 397 (1975).[16] Two statisticians, although critical of some of Professor Ehrlich's technical methods, have duplicated his results; using data other than those used by Ehrlich, these investigators produced "results * * * similar to Ehrlich's." Bowers and Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L. J. 187, 196 (1975) (footnote omitted). Moreover, another recent study, using methodology significantly different from Ehrlich's, has concluded that Ehrlich actually underestimated the deterrent force of capital punishment by a factor of five "and that the evidence is better consistent with the view that one execution will deter at least 50 homicides." Yunker, *The Deterrent Effect of Capital Punishment: Comment* (unpublished manuscript).[17] See also Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals 54, 60 (1952) ("The correlation between these two indices [the number of executions per 1,000 homicides and the homicide rate in 41 death penalty states] was -.26, indicating a slight tendency for the homicide rate to diminish as the probability of execution increases."). These studies provide important empirical support for the *a priori* logical belief that the use of the death penalty decreases the number of murders.[18]

[16] This paper is a revised and shortened version of Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 18 National Bureau of Economic Research Working Papers (November 1973), which we lodged with the Court in connection with *Fowler* v. *North Carolina*, No. 73-7031.

Other studies of the deterrent value of the death penalty (see, *e.g.*, Sellin, *The Death Penalty* (1959)) have not concluded that there is proof that capital punishment deters crime. But neither have they supplied proof that it fails to deter. Zimring & Hawkins, *supra*, at 254-255, 257-258. All of the earlier studies that have found no measurable deterrent effect from the death penalty have shared certain investigatory flaws. For example, these studies have relied not upon the actual *use* of the death penalty, but upon its statutory authorization, as the independent variable against which the murder rate was compared.[19] The

[17] We are lodging 10 copies of the Yunker manuscript with the Clerk for distribution to the Court and have furnished a copy of the manuscript to counsel for the parties.

[18] Several commentators have criticized Professor Ehrlich's work. For the reasons we discuss at pages 43-45, *infra*, we believe that this criticism is irrelevant because legislatures, not courts, must resolve such debates. However that may be, we discuss in Appendix B, *infra*, the debate between Ehrlich and his critics.

[19] In fact, of the nine pairs of contiguous states studies by Bowers, eight pairs included a "death penalty state" that was

effects of mere statutory authorization of capital punishment tell us nothing about the effects of its use, as Sellin himself admitted. Sellin, *supra*, at 20. All of the studies have evaluated the effect of the death penalty on the overall murder rate, rather than on the rate of capital murders, and so the studies cannot exclude the possibility that the death penalty deters the commission of those murders to which it applies.[20] None of the studies has attempted to isolate the effect of the death penalty on special and highly deterrable capital crimes, such as murder for hire. And, perhaps most importantly, all of the earlier studies failed to hold constant factors other than the death penalty that might influence the rate of murders. Only if the death penalty is the sole determinant of the murder rate, or if other determinants are identical in states having different execution rates, would it be proper to infer from these studies that the death penalty has no deterrent effect.[21]

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de facto abolitionist. Bowers, *Executions in America* 137-163 (1974).

[20] Commentators frequently have explained why the statistical material on the death penalty's deterrent value has until now been inconclusive. See, *e.g.*, S. Rep. No. 93-721, 93d Cong., 1st Sess. 8-11 (1974); Royal Commission on Capital Punishment, *supra*, at ¶¶ 62-67; 2 *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 1354 (1970); Gibbs, *Crime, Punishment, and Deterrence*, 48 Sw. Soc. Sci. Q. 515 (1968); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U. L. Rev. 433, 457 (1957).

[21] In any event, we do not think that the meaning of the Eighth Amendment should turn on the results of the latest

But states—even the contiguous states studies by Sellin—have important differences. Indeed, these very differences may explain why one state chooses to use the death penalty and another does not, and still other differences might have an independent effect directly on the rate of violent crime. Or suppose that a state that had abolished capital punishment also had a high arrest and conviction rate for murder, so that although a murderer would be punished less severely, his expectation of net punishment would be greater in this state than in a state with capital punishment but a low arrest and conviction rate. Unless factors such as this are held constant—as the most recent studies have done—no valid conclusions may be drawn. As one opponent of capital punishment has remarked about the previous studies:

> The inescapable flaw is, of course, that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect [from the presence or absence of capital punishment] were observed (and the observed effects, one way or another, are not large) then one could not at all

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social science research. Neither should it turn on the secular trend in the murder rate, although it could be argued that, if the Court declared the death penalty unconstitutional and the murder rate increased, the increase would be evidence that a deterrent had been removed, and hence that the death penalty would again be constitutional. The alternative, that society would have to accept a higher murder rate because of a mistaken empirical estimate by the judiciary, seems unacceptable.

> tell whether any of this effect is attributable to the presence or absence of capital punishment. A "scientific"—that is to say, a soundly based—conclusion is simply impossible * * *. [Black, *Capital Punishment: The Inevitability of Caprice and Mistake* 25-26 (1974).]

Professor Passell, upon whom petitioners rely (*Jurek* Pet. Br. App. 2, Sub-app. E), agrees. He has written: "It cannot be proven that executions do not serve as a deterrent to murder. Proof is simply beyond the capacities of empirical social science." Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 Stan. L. Rev. 61, 79 (1975). And, he writes (*id.* at 62-63), "even were one to accept without qualification the validity of the [pre-Ehrlich] research designs and the accuracy of the data employed, their evidence against deterrence could not be considered conclusive."

The older studies suggesting that capital punishment has no observable deterrent effect are deficient in yet another respect. Their results may have been produced by an entirely practical problem: the real deterrent value of capital punishment may be sufficiently small in relation to the number of murders committed each year that it is difficult to detect, given the deficiencies in data gathering (many crimes are not reported, and changes in the reporting rate are impossible to detect; in some cases it is difficult to determine whether a particular death is a "murder") and the very bulk of the raw data. In recent years there have been more than 15,000 murders per

year,[22] so that even if one execution deterred 10 murders, the effect on the murder rate might become lost in the statistical "noise."

We submit that the states are entitled to make use of the death penalty even if the effects are "small" in comparison to the gross murder rate. We do not imply by this argument that the deterrent value of capital punishment is "small" in human terms; every murder is supremely important to the victim and to his or her family and acquaintances. Indeed, it is supremely important to society, its morale, its sense of community, its sense of the security not only of lives but of values. Suppose that a state finds it necessary to impose the death penalty only a few (two, three or four) times yearly on the worst offenders. In all probability the resultant difference in the capital murder rate will be difficult to detect by even the most powerful statistical techniques. Yet the deterrent effect may be real—and the state is entitled to take the measures necessary to save the several lives that would be lost in the absence of the death penalty. A "small" saving in human life is not so insignificant or immaterial that it can be brushed aside as a permissible basis for legislative judgment.

In sum, although the evidence supporting the logical position that the death penalty deters capital

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[22] Approximately 20,600 murders were committed in 1974. Uniform Crime Reports of the Federal Bureau of Investigation, *Crime in the United States 1974*, pp. 15-19 (1975). Of course, not all of these murders were defined as capital crimes. There is no accurate data indicating the number of capital crimes committed each year.

crimes more effectively than life imprisonment is not yet conclusive, the evidence that there is no deterrent value will never be, and indeed cannot ever be, conclusive. The debate will persist unless and until the evidence of deterrence becomes conclusive, a possibility not to be ruled out. And so long as rational men can debate whether the death penalty deters crime, legislatures should be allowed to resolve that question for themselves and to act upon their decision free from interference by a judicial body that is neither well situated to collect and sift facts nor charged by the Constitution with that task. "[I]n passing on the validity of [legislation], it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. * * * [W]here, as here, the evidence * * * shows that it is at least a debatable question * * *, decision is for the legislature and not the courts." *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594. Congress and 35 states have resolved the debate in favor of capital punishment. "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations * * *. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the con-

flict as it did." *Katzenbach* v. *Morgan*, 384 U.S. 641, 653."

2. ***Capital Punishment Reinforces Important Social Values.***

a. *Expression of Moral Outrage.*

Just as the legislature legitimately may conclude that capital punishment deters crime, so it may conclude that capital punishment serves a vital social function as society's expression of moral outrage. Although sometimes capital punishment is authorized for a crime because society views that crime as serious, the use of capital punishment itself also has an effect on society's view of the crime. Capital punishment marks some crimes as particularly outrageous and offensive, and therefore to be avoided by those individuals with even a trace of social responsibility.[24]

> There is a heavy symbolic significance in the operation of the criminal sanction; for the process of ascribing guilt, responsibility, and punishment goes on day after day against the background of all human history. * * * It is not

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[23] See also *Munn* v. *Illinois*, 94 U.S. 113, 132; *Powell* v. *Pennsylvania*, 127 U.S. 678, 685. See generally Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971).

[24] This effect should be distinguished from deterrence; it achieves obedience to the law's commands not because of the anticipation of punishment but because some individuals will shrink from committing "serious" crimes that strike at the heart of the social order, regardless of the punishment anticipated.

> simply the threat of punishment or its actual imposition that contributes to the total deterrent effect but the entire criminal process, standing as a paradigm of good and evil, in which we are reminded by devices far more subtle than literal threats that the wicked do not flourish. These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior. [Packer, *The Limits of the Criminal Sanction* 43-44 (1968).]

Moreover, this venting of outrage at the violation of society's most important rules—"retribution" perhaps, although stripped of its vindictiveness—is itself an important, perhaps a necessary, social function, and has been approved by the most respected commentators (see, *e.g.*, Packer, *supra*, at 36-37; Royal Commission on Capital Punishment, *supra*, at ¶ 53; Cohen, *Reason and Law* 50 (1950); Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Prob. 401 (1958)) and by this Court. It is difficult to imagine any social goal other than "retribution" served by the execution of Nazi leaders for war crimes and genocide (cf. *In re Yamashita*, 327 U.S. 1). A criminal justice theory that rested entirely upon deterrence would have been unable to support any punishment whatever for Adolf Hitler, had he been captured, and his chief lieutenants. That example alone should warn against the denigration of "retribution" as a completely legitimate social response to truly heinous crimes.

Although the social cohesiveness function served by "retribution" is not the entire end of criminal punishment, it is not a forbidden end, or inconsistent with our respect for ourselves or the dignity of others. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530-531 (opinion of Marshall, J.). Sometimes nothing less is required to reinforce our respect for ourselves or the dignity of others.[25]

> [W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime.

Goodhart, *English Law and the Moral Law* 93 (1953).

Perhaps the mixture of reprobation and expiation known as "retribution" is disapproved by some hu-

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[25] Or as Lord Justice Denning stated to the Royal Commission on Capital Punishment, *supra*, at ¶ 53:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. * * * The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

manitarian and behavioral theorists, but that theoretical disapproval is utterly inadequate to support a constitutional rejection of a carefully considered and rationally supported legislative judgment.

b. *Death is Not Excessive in Relation to All Crimes.*

It has been argued by some that although punishment in general appropriately may be used to deter crimes and express the society's moral outrage over certain crimes, death is always an excessive device even when applied to these legitimate ends. We submit, however, that capital punishment is not excessive in comparison to all provocations and social needs. The "uniqueness" and finality of the death penalty cut two ways: although death becomes an especial object of moral concern, it also becomes uniquely appropriate as society's ultimate sanction, all the more appropriate to the perpetrators of "ultimate" crimes because death alone can be the "ultimate" penalty.

To say that death is inevitably excessive because it affronts human dignity, or imposes suffering, is to beg the question. All punishments offend human dignity and impose suffering to some degree; although capital punishment may be harsh, or even repellent to some, it does not follow that it is "excessive."

> [T]here are a number of things we do not wish to think about that are disgusting and perhaps revolting but that we also acknowledge as necessary. Enemas, the vivisection of monkeys, cleaning up outhouses, all are disgusting or abhorrent, but they may also be necessary. Imprisonment is abhorrent—people would find it so if they knew more about it—but it is hardly, in itself, cruel and unusual punishment. [Polsby, *The Death of Capital Punishment? Furman* v. *Georgia*, 1972 Sup. Ct. Rev. 1, 24.]

We do not contend that death is an appropriate response to any crime the legislature might, in an academic hypothetical, be imagined to select, or that it is never excessive in relation to the crime and to alternative methods of punishment. But there are at least some crimes so serious, so qualitatively different from other crimes, that a qualitatively different penalty is called for out of our understanding of the seriousness of the offense. The Eighth Amendment does not bar such a penalty.

> There is one crime for which neither fines nor incarceration may provide an adequate remedy: murder. The cost to the victim is very high, and may indeed approach infinity * * *. * * * Even prolonged incarceration may not impose on the murderer costs equal to those of the victim.

Posner, *Economic Analysis of Law* 364 (1973). At least in relation to murder death is manifestly "proportional" and hence not excessive. And, of course, it is arguably even more appropriate in relation to certain aggravated forms of murder; there are some crimes so heinous that death seems the only appropriate social reply consistent with our beliefs about the seriousness of the offense. Any more "moderate" reply denigrates the seriousness of the crime and the loss to the victims.

3. ***Capital Punishment Incapacitates Dangerous Offenders.***

It is, perhaps, almost too obvious to dwell upon that those who have been executed cannot commit additional capital crimes. Their execution incapacitates them and saves the lives of those whom they would have killed if they had been allowed to remain alive.

It has been argued in response that the recidivism rate for murder is low, and that incapacitation therefore is not an adequate justification for capital punishment. Although the premise is correct, the conclusion does not follow. There are some sociopathic individuals who, although not insane by any definition, are so immune to normal forms of social control that they are quite apt to commit additional murders even if sentenced to life imprisonment without possibility of parole. These individuals can be detected, and, once detected, it should be constitutionally permissible to execute them.

For example, the defendant in *State* v. *Jarrette*, 284 N.C. 625, petition for a writ of certiorari pending, No. 73-6877, was sentenced to a term of imprisonment for two separate murders. While serving that term he escaped and, within two days of his escape, kidnapped and raped a 16-year-old girl and robbed and murdered a 16-year-old boy. We submit that this defendant has sufficiently indicated a proclivity repeatedly to commit heinous offenses so that execution would be justified solely by the need to incapacitate him. Petitioner Jurek also may be within this category. Within the federal prison system

there are a number of individuals who have been placed into administrative segregation on a continuous basis because, even in the carefully structured prison existence, they are essentially uncontrollable and likely to commit additional violent offenses that might result in death.[26]

We would scarcely argue that the need to incapacitate certain offenders is a good ground for the execution of all offenders. But offenders may by their actions become open to capital punishment under this rationale, perhaps after committing a second murder.[27] In any event, this justification for capital punishment, like the other justifications, does not stand alone. It is cumulative with the others; together, even if not separately, they indicate that legislatures rationally could decide that capital punishment is an appropriate response to some crimes. The Constitution requires no more.

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[26] The Bureau of Prisons holds one individual who has been convicted of killing three people while in prison. No action other than execution (or, perhaps, constant and heavy sedation) can surely prevent him from killing again. The Bureau holds 20 other individuals who, while serving sentences of 25 years or more for various crimes, have been convicted of murdering a fellow inmate or a member of the prison staff. The prospect of an additional sentence of imprisonment is unlikely to dissuade these individuals from their pattern of aggressive behavior.

[27] See 49 U.S.C. (Supp. IV) 1473(c)(7)(B)(i), reprinted in App. C, *infra*, pages 22a-23a; Section 2401(a)(2)(B) of the proposed revision to the federal criminal code, reprinted in App. D, *infra*, page 25a.

B. Capital Punishment Is Accepted by Modern American Society

The best available evidence that the public has not rejected capital punishment lies in the actions of the representatives of that public. Since the decision less than four years ago in *Furman* v. *Georgia*, *supra*, at least thirty-five states (*Fowler* Pet. Br. App. A; *Jurek* Pet. Br. App. 2, Sub-app. A and App. 4) and the United States (App. C, *infra*) have enacted statutes providing for the death penalty for at least some crimes, and other states are considering whether to take similar action. Such statutes could not have been enacted in so many states in such a short period of time if our society rejected capital punishment.

This blunt fact cannot be avoided with the contention that elected legislators and chief executives do not necessarily reflect the moral belief of the communities they represent. They certainly reflect it more accurately than does the judiciary, which was made independent precisely in order to insulate judges from majority sentiment. The assumption underlying representative democracy is that the legislative process reflects the will of the people, and that if legislators interpret this will inaccurately new legislators, more sensitive to the public's desires, will be elected and unacceptable laws repealed. Petitioners dispute that assumption and seek an anomalous referendum among judges as a proxy for the "true" will of the electorate. That is not the function of judicial review in our constitutional system.

The attempt to attack capital punishment by distinguishing between the people and their elected representatives fails on other grounds as well. If the distinction were to be made, the salient difference that appears is that the representatives are better informed than the electorate. The former have had to debate the issue of capital punishment, to listen to the arguments for and against, and to confront and make the moral and prudential choices.

Petitioners' object of distinguishing between the society and its representatives, however, is not to prove that the generality of voters are better informed or more "enlightened" morally than their representatives but to suggest, in fact to speculate, that the sentiment of the public, contrary to that of the representatives, may be against capital punishment. That speculation may not properly be entertained by a court reviewing a legislative determination. A court's constitutional function does not encompass guessing what a referendum might show.

If such speculation were relevant, however, what direct evidence there is suggests that the people themselves support the death penalty; there is no social consensus that the ultimate punishment is barbaric, or even that it is offensive. Far from it. For example, after the Supreme Court of California struck down the death penalty under that state's constitution, the people of California promptly amended their constitution by initiative. The vote in favor of the initiative was overwhelming. California Constitution Art. I, § 27. A referendum in 1968 in Massachusetts

showed that the citizens of that state also support capital punishment.[28] Evidence from public opinion polls also indicates that popular support for the death penalty has been increasing in recent years and that supporters of capital punishment outnumber opponents by a ratio of two to one. See S. Rep. No. 93-721, 93d Cong., 1st Sess. 13-14 (1974) (reprinting polls). Cf. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1249 (1974). We do not introduce the results of these polls as a suggestion that the constitutionality of a particular penalty depends on today's straw polls. The interpretation of survey research may be a legislative function; it is not a judicial function. We cite it merely to demonstrate that, even if one proceeded on an incorrect view of the judicial function, the evidence necessary to a judgment against the death penalty is not only absent but contradicted. The polls offer no evidence that the public rejects or is revolted by the idea of capital punishment; instead, the public supports the penalty.

There is other and more persuasive evidence of the feelings of the people in general. No defendant may be sent to his death unless he first is convicted by a jury of his peers, and that conviction requires the unanimous vote of twelve.[29] If there were overwhelm-

[28] The results are reproduced in *Commonwealth* v. *O'Neal*, *supra*, 339 N.E.2d at 708 (Reardon, J., dissenting).

[29] No state provides for capital juries of less than twelve, and none allows conviction of such an offense by other than unanimous vote. See *Johnson* v. *Louisiana*, 406 U.S. 356; *Apodaca* v. *Oregon*, 406 U.S. 404; *Williams* v. *Florida*, 399 U.S. 78, 89, 103.

ing rejection of the death penalty in the community, juries (which may not be death-qualified, *Witherspoon* v. *Illinois*, 391 U.S. 510) would fail to reach verdicts condemning men to death. But the fact that there have been more than 150 such convictions and death sentences in 1974 alone demonstrates that this is not so. Some juries may fail to convict; many do convict, unanimously.

The only remaining indicia from which it might be concluded that the death penalty actually has been rejected by society at large is the fact that death in recent years has been imposed on only a small number of those who have committed capital crimes. The argument proceeds to the false conclusion that this demonstrates that public acceptance of the idea of capital punishment is a mirage—that capital punishment is accepted in theory but rejected in fact.

To a great extent the decline in the use of capital punishment in recent years is the effect of judicial activity—of stays forbidding the death penalty pending completion of additional litigation and collateral attacks; of judicial willingness to find in a capital case error that would be unnoticed or "harmless" in another case; of an expanded arsenal of procedural claims available for collateral attack; of the *Furman* decision itself and the litigation that preceded it. Such inactivity as has resulted from these causes shows no rejection of the death penalty itself; it shows at most that the criminal justice system is

increasingly willing to examine the propriety of a particular death penalty. To the extent executions have been stayed by the federal judiciary, the "trend" against capital punishment has been produced by individuals not accountable to the will of the people. Federal judges were afforded life tenure in order to provide insulation from such influences, and it would therefore be inaccurate to interpret judicial queasiness over capital punishment as an expression of the popular will.

To the extent that the decrease in the number of deaths by execution in recent years has been the result of legislative or executive activity, it is consistent with explanations other than "rejection" of the use of death as an instrument of social policy:

> To be sure, the penalty of death is infrequently imposed. An entirely valid inference from this bare fact would be, not that the society has repudiated the penalty, but that it wishes to preserve its use to a small number of cases. A reluctance to impose a penalty is not necessarily the same as its repudiation. Reluctance may spring from moral revulsion; but it may just as commonly proceed from a humane and heartfelt sorrow.

Polsby, *supra*, at 20. A reverence for the importance of human life may explain a thoroughly considered (and entirely acceptable) social policy to limit to a minimum the number who must be put to death, while reserving that extreme penalty to a few extreme cases. Perhaps, alternatively, reserving the

sanction to a few "exemplary" cases, sparing others who might be "eligible" to die but whose deaths would add little to whatever social goals can be served by some lesser number of executions. The Constitution ought not to be read to compel the state to engage in mass executions in order to preserve the power to execute anyone at all.

C. Differences of Opinion Concerning the Propriety of the Death Penalty Must Be Resolved in Favor of the Legislative Judgment

We have suggested that the cruel and unusual punishments clause of the Eighth Amendment, understood in its historical context, properly is interpreted as a device for enforcing the overwhelming social consensus of the times, and properly may be used to curb aberrations occurring when isolated individuals (or legislatures), through ignorance or malice, flaunt those standards and create or impose punishments utterly unacceptable to society and degrading to society's dignity. This statement of the scope of the amendment carries with it a statement about the limits of judicial review. A punishment is not "cruel and unusual" unless utterly outside the bounds of social tolerance.

The bases of support for capital punishment that we have discussed above suggest that, wherever the bounds of social tolerance may be, they are not exceeded by capital punishment. It is approved by many legislatures and imposed by numerous unanimous juries. It is supported by substantial majorities in

opinion polls. It is not excessive when compared to crimes such as murder. There is room for legislative debate and honest difference of opinion concerning whether it deters others and expresses legitimate social approbation of heinous deeds.

The careful balance of considerations supporting the death penalty against the moral or humane concerns of those who oppose death perhaps accounts for the great debate capital punishment has generated throughout the history of this country.[30] It has been a subject of debate since the founding of the republic (see, *e.g.*, Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (1793)), and the debate bids well to continue. It has been a subject of intense debate precisely because there is much to be said on each side, and because neither proponent nor opponent has any argument that must convince all rational people of that side's validity.

Even if the cruel and unusual punishments clause were not limited to enforcing a social consensus that has broken down in an individual case, the propriety of the death penalty would nevertheless be apparent.

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[30] What better evidence of the equipoise of the debate, and consequently of the validity of legislative choice, than this concession (*Fowler* Pet. Br. 118-119): "The opposition to capital punishment * * * has been vigorously asserted on the basis of 'fundamental moral and societal values in our civilization and in our society.' Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument" (footnotes omitted).

The death penalty is rationally supported and rationally supportable: reasonable men can and do disagree about the merits of capital punishment, but reasonable men cannot say that no reasonable man would support the death penalty. Because the evidence and the moral concerns are so balanced, the Court cannot conclude that the legislatures and juries have made such a "clear mistake" (cf. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893)), that their considered deliberations must be disregarded and the law set aside. Or, as Judge Learned Hand put the matter, when dealing with an amendment that grew out of the seventeenth century procedural victories of Parliament over the Crown:

> [I]n such cases I cannot see why courts should intervene, unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised.

Hand, *The Bill of Rights* 66 (1958).

There are in this area no clear mistakes by the legislature. A given legislature may be "mistaken" in applying capital punishment to a given crime or another legislature may be equally "mistaken" in failing to apply it. Indeed, there seems to be no way to exclude the possibility that an omniscient observer would conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate or, to the contrary, that capital punishment is appropriate to many more instances of crime than legis-

latures and juries now believe. But the data such an omniscient observer would use, and the standards he would apply when weighing the moral values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. There are no neutral principles by which the death penalty may be condemned; there is nothing more than a belief that the legislature, after consideration of weighty policy considerations on both sides, may have chosen the "unwise" course. That is not enough. Courts

> are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as those now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. * * * Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us.

Dennis v. *United States*, 341 U.S. 494, 525-526 (Frankfurter, J., concurring).

The core of petitioners' argument is that Congress and 35 state legislatures have lost their moral compass and can no longer be trusted to legislate in the interest of the entire people. Petitioners ask this Court to assume the tasks of those legislatures that do not share their moral values. That, of course, is not the constitutional function assigned the federal judiciary.

D. Several of the Empirical Observations by the Justices Who Concurred in *Furman* Require Reassessment in Light of Subsequent Evidence

The Justices who comprised the majority in *Furman* advanced several rationales for their decisions. Some of the arguments have their roots in the history of the cruel and unusual punishments clause. We have addressed these arguments at pages 16-34, *supra*. Other of the arguments are more factual in nature and were facilitated by a number of essentially empirical observations about the nature and utility of capital punishment. We believe that the force of many of these arguments has been eroded by post-*Furman* developments, and that others are factual arguments properly within the legislative sphere.

1. At least two of the Justices who concurred in *Furman* relied upon the belief that the "legislative will is not frustrated if the [death] penalty is never

imposed" (408 U.S. at 311 (White, J., concurring); *id.* at 309 (Stewart, J., concurring)). That is an empirical observation. At the time *Furman* was decided, the validity of that statement could have been disputed. But we submit that the evidence is now in, and that there is no longer room for doubt. Congress and the state legislatures have responded to *Furman* by enacting statutes that disclose their will. Indeed, several states enacted mandatory death penalty statutes; given by this Court's decision in *Furman* what they believed to be a choice between sentencing all of those convicted of first degree murder to death, and sentencing all to life imprisonment, these states selected death. Some legislatures have responded to *Furman* not by extending mercy to all, but by removing mercy that previously had been extended to some. It is now clear that the legislative will *is* frustrated unless the death penalty is imposed upon some individuals.

2. At least three Justices expressed the view in *Furman* that capital punishment is cruel because it "goes beyond what is necessary not only in degree, but in kind." See 408 U.S. at 287-290, 301-302 (Brennan, J., concurring); *id.* at 306, 309 (Stewart, J., concurring); *id.* at 347-354 (Marshall, J., concurring). This proposition, too, is empirical. Its validity depends upon the meaning of the word "necessary." If that word refers to the perceptions of legislatures, any doubts that may have existed now have been resolved, for legislature after legislature has responded to *Furman* by enacting (or reenacting)

capital punishment statutes, demonstrating that the legislature believes that capital punishment is "necessary."

The proposition might alternatively be an objective observation of either of two sorts. The first—the "strong" sense of "necessary"—is that capital punishment is not necessary because modern society can survive without it. But this would be a test without any support in the Constitution. No legislation is required to stand or fall on the question whether that particular law is essential, is a *sine qua non*, for the preservation of our way of life. The death penalty obviously is not necessary in this strong sense, nor need it be.

The weaker sense of "necessary" is used in constitutional adjudication: a statute passes constitutional muster if it serves ascertainable legislative purposes.[31] The argument then would be that the death penalty is not "necessary" because it serves no useful purpose. We have discussed at pages 34-51, *supra*, of this brief the purposes served by capital punishment. Although there may be debate concerning the effectiveness of capital punishment in achieving these ends, we do not see how it is possible to contend that it would be arbitrary or irrational for a legislature to resolve such disputes in favor of the effectiveness (and hence "necessity") of capital punishment. The

[31] See, *e.g.*, *Marshall* v. *United States*, 414 U.S. 417, which uses this standard to adjudicate a challenge to the rationality of a statute imprisoning some criminals while allowing others to receive treatment.

empirical nature of the dispute suggests that legislative resolution is appropriate.

3. Mr. Justice White argued (408 U.S. at 312) that "a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. * * * [C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted." See also *id.* at 309 (Stewart, J., concurring).

It is now clear that some states, of which North Carolina is one example, are willing to impose the death penalty with substantial frequency. The concern of Mr. Justice White would not apply to these states. But even as to other states that elect to make less use of the death penalty, this argument is empirical, and we do not believe that it is accurate. Some states simply have made the legislative judgment that their ends can be achieved without the need to execute large numbers of people, that such harshness would be unnecessary. What judicially ascertainable facts would enable the Court to impeach this judgment? If the legislature is entitled to conclude that 100 executions would deter 500 murders, by what standard could a court conclude that five executions would

deter none?" [22] A legislature entitled to conclude that 100 executions would deter 500 murders also is entitled to conclude, based on the available evidence, that five executions would deter 25 murders. It equally properly could conclude that five executions would deter 50 murders, for there may be diminishing returns to executions, just as there are diminishing returns to many of our other activities. A few executions in a state each year might well generate as much publicity as many executions, and if potential criminals desire to avoid the *risk* of execution as well as the actuality of it many would hesitate—and some would desist—from committing murder.

But the core of the matter is simply that it is for the legislatures to choose the goals that will be pursued. There is no constitutional requirement that the legislature must select the goal of deterring a substantial number of murders yearly. As we have said before, a "small" saving in human life achieved by a "small" deterrent effect is not so insignificant that it can be denigrated as a permissible basis for legislative choice. See pages 42-43, *supra*.

III. CAPITAL PUNISHMENT IS NOT IMPOSED ON THE BASIS OF RACE

The selection of those to be executed might be open to serious question if it were influenced by the

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[22] Cf. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, Mr. Justice White, concurring and dissenting, slip op. 5-11.

race of the defendant. We submit that the data do not show that race is a factor.[33] We have included in Appendix A to this brief an analysis of the findings of the studies relied upon by petitioners and others. These studies contradict each other, and the most recent (and sophisticated) study, the Stanford Note (*A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297 (1969)), found no evidence whatever of racial discrimination in capital punishment for murder. We are aware of no properly-conducted study that supports a contrary conclusion.

The only studies that even inferentially suggest a possibility of racial discrimination were conducted in the South during a time when blacks were often excluded from grand and petit juries. They do not demonstrate that discrimination persists now that blacks sit in judgment on other blacks. It is true that both the National Prisoner Statistics (Law Enforcement Assistance Administration, *Capital Punishment 1974*, Table 16 (1975)) and information compiled by the NAACP (*Jurek* Pet. Br. 83-84, n.147) indicate that approximately 50 to 60 percent of all those sentenced to death are black. This is only the beginning of the inquiry, however. In order to determine whether this indicates discrimination, we would need to know what proportion of all

[33] See also *Furman* v. *Georgia*, *supra*, 408 U.S. at 389-390, n.12 (Burger, C.J., dissenting); *id.* at 310, n.14 (Stewart, J., concurring); *id.* at 447 (Powell, J., dissenting).

capital crimes are committed by blacks.[34] Although there is no direct measure of that proportion, the number of arrests for willful felonious homicide may be the closest approximation. The Uniform Crime Reports of the Federal Bureau of Investigation (*Crime in the United States 1974*, p. 191 (1975)) indicate that 57.1 percent of those arrested for willful felonious homicides are black. There is, therefore, little or no discernable discrimination against blacks from the time of arrest through the pronouncement of a sentence of death; blacks are not a higher proportion of those sentenced to die than they are of those arrested for the most serious types of murder.[35] Nor is there any evidence that blacks are arrested for their crimes more often than are whites. The evidence concerning arrest is consistent with the evidence concerning the race of the victim. Exactly half of all murder victims are black. *Crime in the United States 1974*, p. 15 (1975). If capital punishment deters murders (as legislatures are entitled to

[34] "These statistics alone, of course, do not reveal elements of judicial bias in the administration of criminal law. It is also well recognized that blacks in American society * * * have a criminal homicide rate that is between four and ten times greater than that of whites." Wolfgang and Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals 119, 123 (1973). See also White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 Duq. L. Rev. 279, 281-285 (1974).

[35] Many murders or other capital crimes grow out of other violent felonies. The Uniform Crime Reports indicate that blacks are arrested for these crimes, too, in disproportionate numbers. Of those arrested for robbery 62.3 percent are black; of those arrested for aggravated assault 41.2 percent are black. *Crime in the United States 1974*, p. 191 (1975).

conclude), it would follow that abolition of capital punishment would work to the detriment of the poor and the blacks, who are disproportionately the victims of murder.

If it is proper to assume that some individuals in the criminal justice system discriminate on account of race or other impermissible factors, the existence or extent of this discrimination will vary from time to time, place to place, and state to state. Proof of discrimination by the prosecutor and juries of one county in one state would not prove that petitioners in these five cases are the objects of discrimination. It is unlikely that discrimination can account for the sentences imposed upon petitioners Gregg, Jurek and Proffitt, who are white. The argument that blacks may be treated harshly when they have committed crimes against whites is not an argument against the penalty imposed upon a black who murders another black, as was the case in *Fowler*.

In short, the possibility of racial discrimination in the selection or imposition of a particular punishment depends strictly upon the facts and circumstances of the case. It is not an argument against all capital punishment for all time. Indeed, the argument has nothing whatever to do with capital punishment. *Any* punishment selected or augmented on racial grounds is impermissible. No petitioner has contended that he was discriminated against on account of his race. Accordingly, the possibility that racial discrimination exists upon occasion in the criminal justice system is not an argument against the penalty imposed upon petitioners.

IV. CAPITAL PUNISHMENT MAY BE IMPOSED UNDER THE CRIMINAL JUSTICE SYSTEM'S PRESENT PROCEDURES. EACH PROCEDURE IS EITHER REQUIRED OR PERMITTED BY THE CONSTITUTION ITSELF

Petitioners devote much of their briefs (see also *Fowler* Pet. Br. 42-101, upon which several petitioners rely) to the argument that the procedures for processing capital cases are arbitrary and capricious. Petitioners object to the discretion involved in the prosecutor's decision to charge, in plea bargaining, in the jury's determination of guilt and punishments, and in executive clemency. This "elaborate argument * * * does not need an elaborate answer." [36] Petitioners obviously do not contend for a system in which the prosecutor must charge a capital offense whenever there has been a killing, in which the defendant could not plead to a lesser offense, in which the jury must convict, in which clemency could not be exercised. We would then have the rule of the Tyrant which ancient Greece replaced with the rule of law millenia ago. The generalization that the death penalty always violates the Eighth Amendment can be made *only* because the discretion petitioners find objectionable will be inevitable so long as we have a constitutional system of criminal justice.[37]

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[36] Mr. Justice Holmes, in *United States* v. *Wurzbach*, 280 U.S. 396, 399.

[37] In regard to prosecutorial discretion, the brief in *Fowler*, upon which several petitioners rely, points out that it is

Indeed, it is strange that petitioners even frame this procedural argument in terms of the Eighth Amendment. One would have supposed that if the evil is in the process, the remedy is in the command that no person may be "deprived of life * * * without due process of law." That of course was the argument in *McGautha* v. *California*, 402 U.S. 183, 207, with respect to jury discretion, and the Court rejected it. To cast the same argument differently and say that the Eighth Amendment proscribes some unattained and unattainable system for processing capital cases is to contend that this constitutional provision contains its own refutation. The Eighth Amendment cannot mean that, although the death penalty is a permissible type of punishment, it can never be imposed under our criminal justice system because the system cannot, should not, be altered to meet petitioners' objections to it. Yet (unless we misapprehended their position) that is what petitioners would have this Court rule.

"*necessarily* and *unavoidably* arbitrary" (Br. 53) (emphasis changed).

In regard to plea bargaining, the brief notes that the acceptance of pleas to lesser offenses "is doubtless inevitable" (*id.* at 61).

In regard to the exercise of discretion by the jury, the brief does not impugn the jurors' integrity but only "acknowledge[s] that they are human" (*id.* at 75) and that there is an "inevitable propensity" for juries to alleviate the harshest of penalties (*id.* at 91-92).

In regard to executive clemency, the brief appears to recognize that the very concept encompasses discretion (*id.* at 95-96). See *Schick* v. *Reed*, 419 U.S. 256.

Petitioners state that they are not suggesting that the selective discretion present at any of the separate stages of the criminal process would be constitutionally objectionable in a non-capital case. With all respect, we submit that they are suggesting just that. There is not a single argument petitioners put forward in this regard that could not equally be made in regard, for example, to the penalty of life imprisonment for first-degree murder. Petitioners argue that the "procedure for processing capital cases involves a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die." [38] If the Court accepts that proposition as the basis for striking down the death penalty, how can the Court hold unobjectionable the "procedure for processing criminal cases which involves a series of 'uncontrolled' discretionary judgments that operate to spare the liberty of some defendants while others in similar circumstances are sentenced to imprisonment?" [39]

Petitioners' analysis begs the question whether the difference in penalty is a constitutional difference. If a state properly can prescribe the death penalty for at least some crimes, as we have argued above,

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[38] See *Fowler* Pet. Br. 15.

[39] Appellate review is part of what petitioners call the "procedure for processing capital cases," yet it cannot be that the death penalty is unconstitutional because, for example, this Court has discretion to deny petitions for writs of certiorari in capital cases.

then it is impossible to turn to the Eighth Amendment as a source of a constitutionally-supported principle that this difference in the penalty imposed requires a difference in the process used. Perhaps one could argue that for due process purposes death is different because more serious, and that the process that is "due" for crimes with less severe sanctions is insufficient for more serious ones. But petitioners have eschewed the due process argument and, as we noted above, a similar due process argument failed to persuade the Court in *McGautha*.

Since a conclusion by this Court that the procedures of the criminal justice system are too discretionary will inevitably impugn those procedures in regard to penalties other than death, claims of that nature properly should be consigned to particular allegations against particular areas of discretion, rather than to an overall, and therefore less-well-focused, inquiry. Thus, for example, petitioners contend that capital crimes are so vaguely defined that a jury sometimes will have difficulty ascertaining when one has been committed. But, of course, this is not always so. There is no difficulty in the definition of murder by lying in wait, or by poison; there is little difficulty in the definition of murder for hire or in the course of a kidnapping. The definitional difficulties in other forms of murder are more considerable: premeditation and malice aforethought invite consideration of a sometimes elusive element of intent.

But if there is to be a vagueness-type challenge to a particular definition, it is a challenge potentially available to one whose conduct is within the zone of uncertainty, not one whose conduct is clearly prohibited. *Parker* v. *Levy*, 417 U.S. 733; *United States* v. *Harriss*, 347 U.S. 612, 618. The assertion that some capital statutes are vague as applied to some crimes committed by other individuals is an inadequate foundation for petitioners' contention that capital punishment itself inevitably is arbitrarily or capriciously imposed.[40]

For the foregoing reasons, we believe petitioners' procedural contention must be rejected. We are, however, somewhat hesitant to conclude our discussion of the matter at this point. The discretion inherent in our system of criminal justice may need no defense, but it serves such important goals that further elaboration is, we believe, appropriate.

A. Discretion in the Criminal Justice System Serves Important Social Functions

The need for some discretion in a system of criminal justice arises because the varieties of human

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[40] It would be more appropriate to tender more narrow challenges to other sources of discretion in the criminal justice process as well. Many of the points of choice discussed by petitioners could be altered to produce more predictable and uniform decisions in response to particularized complaint. See, *e.g.*, Ark. Stat. Ann. 41-4714 (1973 Cum. Supp.) (governor must give reasons for commuting death sentence); Ill. Rev. Stat. ch. 38, Section 1005-8-1A (1974 Cum. Supp.) (prosecutor must seek death when aggravating circumstances appear); N.Y. ch. 367, Section 10 (1974 Legis. Assembly, May 6, 1974) (defendant may not plead guilty to a capital crime).

endeavor are endless and unpredictable. The variety of the circumstances of offense and offender is so great that it cannot usefully be anticipated in a single criminal statute. Nor, for that matter, is our language sufficiently precise to enable legislation to account for these differences, even if all could be anticipated. Perhaps it approaches the limit of human abilities to specify some reasonably clear criteria that mark off those whose crimes are sufficiently serious that capital punishment is "authorized," and to provide that for at least some of those for whom it is authorized, it is also appropriate.

In the formative years of this country most statutes providing for the death penalty were "mandatory;" all convicted under them were sentenced to death. For the reasons discussed in this Court's decision in *McGautha, supra*, 402 U.S. at 196-208, this procedure was unsatisfactory because these statutes selected some men who did not merit the ultimate penalty—depending on the reaction of the jury, such individuals unjustly might be sent to death, or they might be acquitted entirely as the jury, acting as the conscience of the community, refused *despite* the evidence to convict a man whom they believe should not be executed. The conscious decision to extend to the jury the ability to do openly what it had been forced to do covertly was one of the major advances of American criminal justice:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have

> confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. [*McGautha, supra*, 402 U.S. at 204.]

Nevertheless, in response to this Court's decision in *Furman*, those states that have reenacted death penalty statutes have attempted to structure and confine the discretion available to the sentencing authority. One course, adopted by North Carolina and Louisiana, eliminates sentencing discretion entirely. Another course, adopted by the United States (see App. C, *infra*), Georgia, Texas and Florida, enumerates those aggravating characteristics without which no crime is "capital."[41] This, in turn (petitioners assert) simply transfers the exercise of discretion to other locations in the criminal justice system. Even if we were to agree with this premise, the conclusion that the death penalty is unconstitutional does not follow, for we believe that *McGautha* correctly concluded that some discretion is permissibly a part of the process of determining who is to be executed. Cf. *Winston* v. *United States*, 172 U.S. 303 (attempt to limit jury discretion in capital case impermissible).

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[41] See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974), for a more complete typology of the post-*Furman* statutes.

One objective of modern criminal justice is to tailor the punishment, at least to some extent, to the offender as well as to the offense. We assume that petitioners would not embrace a rule that legitimated capital punishment only when it followed automatically and without variation from the mere fact of an offense described in the broadest possible terms; that alternative has been rejected (without the need for constitutional compulsion) by the states. Still less can be said that the Constitution *requires* that all offenders equally receive terms of life imprisonment (although we do not deny the legislatures' power to make that choice, too). Despite the superficial uniformity of such a course, there is real inequality in treating identically individuals who are different in essential characteristics and who have committed crimes factually dissimilar, even though language and human forethought are inadequate to commit all relevant differences to expression in the form of "rules." And, if the Constitution admits of any discretion in this fashion, the discretion currently present in the criminal justice system is not so excessive or unprincipled that its mere presence as a means of administering mercy precludes the imposition of any capital punishment whatsoever.

B. The Discretion in the Criminal Justice System Does Not Result in "Freakish" Imposition of Capital Punishment

Four Justices in the *Furman* majority asserted that capital punishment is unconstitutionally "unusual" because it is infrequently used. See 408 U.S.

at 256-257 (Douglas, J., concurring); *id.* at 291-292 (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 312-313 (White, J., concurring).

This is a proposition that deserves further analysis. It is not immediately clear why a particular individual should be able to block his own execution (if it is otherwise justified) on the ground that not enough individuals are being executed with him. But, pretermitting that difficulty, we believe that the problem with the argument is that frequency is a relative phenomenon. Capital punishment can be "infrequent" only in relation to something else. The implicit assumption may be that frequency should be assessed in relation to the number of convictions for crimes for which the death penalty is authorized.[42]

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[42] Several Justices also intimated that capital punishment is unusual because it is imposed for a diminishing number of crimes. We do not believe that this is an argument against the death penalty; legislatures should not be taken to task for reevaluating the need for this extreme sanction and confining its use to those crimes for which it is both most appropriate (in the sense that the punishment is proportional to the offense) and most needed (in the sense that society must deter the commission of the offense and express its disapprobation). In any event, the absolute frequency of capital punishment is still quite high. *Furman* spared approximately 600 individuals; in less than four years since *Furman*, and despite the damping effect that decision produces on the use of the death penalty, more than 400 individuals have been placed under sentence of death, 151 of them in 1974 alone. Petitioner Jurek concedes that this is a "not inconsiderable" number. *Jurek* Pet. Br. 67, n.108. In large measure the "infrequency" of capital punishment is due to judicial decisions, and so cannot be assigned as an argument against the constitutionality of a legislative decision that some capital punishment is necessary.

Assuming that this is the proper standard of comparison, the available evidence indicates that when capital punishment is authorized for a serious crime it is prescribed relatively often. For example, in California, during the period studied by Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297, 1299 (1969), the jury set the death penalty for 103 of 238 individuals convicted of first degree murder. In North Carolina a death sentence now is imposed upon every individual convicted of first degree murder, and there have been more than 115 such convictions in the last three years (*Woodson* Pet. Br. App. A; *Fowler* Pet. Br. App. B).

We do not believe, however, that this is the relevant comparison for constitutional purposes. It would be more appropriate to compare the number of executions carried out with the perceived need for the death penalty. Sentences of life imprisonment, too, are "infrequent" compared with sentences of five years or less. Sentences of life imprisonment are rarely carried out, for the individual subject to such a sentence often is released on parole. But this hardly establishes that life imprisonment is unconstitutionally unusual, for the constitutional concept must include an element of proportionality to the perceived social need to impose the punishment in question. The paucity of actual executions in recent years—to the extent it is attributable to explanations other than the decisions of this Court and other courts—suggests that our society has decided to con-

fine the use of its extreme sanction within fairly narrow bounds, that although a large absolute number of executions is not thought necessary, some smaller number is appropriate. See pages 42-43, 56-57, *supra*. The death penalty should not be held to be unconstitutionally unusual unless it is very infrequent in relation to the perceived need for it, and there is no reason to believe that it is infrequent under this standard.

For many of the same reasons, we respectfully suggest that the death penalty, when actually imposed, is not imposed "capriciously," "wantonly" or "freakishly" (see 408 U.S. at 309 (Stewart, J., concurring); *id.* at 295 (Brennan, J., concurring). Petitioners embellish this argument, which, as we have argued at pages 69-76, *supra*, is a Due Process attack in disguise. For that reason, if accepted, it would imperil the validity of any conceivable penalty. Is it "freakish" when an individual is sentenced to five years' imprisonment rather than three, when the statutory maximum is life imprisonment? [43] To argue that capital punishment makes a difference in this regard is to beg the question—if it can be explained *why* capital punishment makes the difference, then the constitutionality of the death penalty can be resolved in Eighth Amendment terms, *based on the nature of that difference*, without regard to the process by which it is imposed. And if the nature

[43] Cf. *Griffin* v. *Warden*, 517 F.2d 756 (C.A. 4), holding that the Due Process Clause allows a state to give a prosecutor unbridled discretion to seek life imprisonment.

of that difference cannot be drawn from the Eighth Amendment, the fact that the imposition of capital punishment is no more arbitrary than the imposition of any other particular punishment under our constitutional system of criminal justice disposes of the argument based on "arbitrariness."

To the extent the argument based upon "arbitrariness" has any content, it must be directed to the nature of the process by which the sentence has been prescribed. "[C]an there be any reason to accuse a state of arbitrariness in passing out sentences of death if the process cannot be shown to have been operated unfairly in producing this result?" Polsby, *The Death of Capital Punishment? Furman* v. *Georgia*, 1972 Sup. Ct. Rev. 1, 14. And, at this point, the argument collapses, for, as we discuss at pages 82-100, *infra*, each of the steps by which the death penalty is imposed is either required or permitted by the Constitution itself. If there is no unfairness in the process, the result of that process cannot be unfair.

It would make more sense to say that the result of the process by which death is prescribed as punishment for crime is "freakish" if some random or invidious factor were introduced that aggravated the potential punishment for specific individuals. But that is not what happens. The discretion inherent in the criminal justice system is weighted heavily in favor of mercy. The ability of the prosecutor to charge lesser crimes and to accept a plea bargain; the power of the jury to acquit altogether or to

convict of lesser included offenses; the power of the executive to grant clemency; these and other instances of discretion serve to mitigate the harshness of a penalty, not to increase its harshness. As Professor Polsby put the matter (1972 Sup. Ct. Rev. at 20):

> Consider arbitrariness. Does it follow "inescapably" that a punishment is being inflicted arbitrarily (and therefore impermissibly) when it is "inflicted in a trivial number of the cases in which it is legally available"? It seems to me inherently plausible that juries, judges, and governors of states conduct themselves with deliberation and caution so as to err on the side of mercy, reserving their ultimate punishment for those whose transgressions are most clearly established and seem to them most revolting. This explanation if it is accurate (and no one knows whether it is) is not arbitrariness but the antithesis of arbitrariness.

As the criminal justice system now stands, it is utterly impossible for one person or several persons, acting out of prejudice, malice or stupidity, to inflict the death penalty. But at every stage it is possible for one person or a small group of people to prevent its infliction. The multiplication of occasions for mercy is the system's great safeguard. It cannot simultaneously be the source of its unconstitutionality.

If the explanation from mercy is incorrect, the burden of establishing its inaccuracy should fall upon those who seek to upset the judgment of the

legislature. Petitioners have not discharged (or even shouldered) that burden."

C. Each of the Particular Sources of Discretion in the Criminal Justice System Is Either Permitted or Compelled by the Constitution Itself

Petitioners attack the discretion now possessed by prosecutors (in conjunction with the grand jury) to decide whom to charge and with what crime; the discretion of prosecutors (in conjunction with the court) to accept a plea to a lesser and non-capital

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" Moreover, even if (contrary to the fact) capital punishment were imposed upon a group selected at random, it is far from clear that this would be a constitutional defect. The governmental purpose often can be achieved by imposing a detriment on less than all of those who are "eligible" for it. When this can be done, random selection is the most fair device. There is no need to burden the entire population when the governmental purpose can be achieved by less onerous means. For example, people have been selected by lot for conscription into the military, while others, identically situated, have been excused. School assignments for elementary and secondary schools are often made by lot, where some pupils must be transported over a distance while others can be allowed to attend nearby schools. There are many other examples. So long as the criteria used for selection are not invidious, there can be no reasonable argument that such selection is constitutionally infirm.

For the reasons we have discussed above and at pages 42-43, 56-57, *supra*, there are sound reasons, grounded in mercy and humane compassion, for desiring to hold to a minimum the number who must be executed. If society could accomplish that aim by holding a lottery among all those convicted of first degree murder, how could it be unconstitutional to accomplish the same aim by a discretionary system of selection weighted in favor of mercy and considering the needs of the individual and the nature of his crime?

offense; the power of a jury to avoid a conviction that sends a defendant to his death either by acquitting in spite of the evidence or by convicting of a lesser included (and non-capital) offense; the power of the judge and jury to weigh aggravating and mitigating circumstances; and the power of the executive to grant clemency. We submit that the discretion possessed by each of these actors serves important goals of criminal justice, and for that reason has been upheld by this Court as consistent with the Constitution. Moreover, several of the sources of discretion are the result of specific constitutional commands, and any attempts to confine or eliminate the discretion would be unconstitutional. Because each of these sources of discretion is either permitted or encouraged by provisions in the Constitution other than the Eighth Amendment, the product (the sentence) of this fully acceptable process cannot itself violate the Constitution.

1. *The Charging Decision.*

A federal prosecutor has an unfettered power to decline to bring charges against any individual. The prosecutor need not seek an indictment, and under Fed. R. Crim. P. 7(c) the United States Attorney may, by declining to sign an indictment, prevent prosecution of a case in which the grand jury has concluded that there is good ground to prosecute. See *United States* v. *Cox*, 342 F.2d 167 (C.A. 5), certiorari denied *sub. nom. Cox* v. *Hauberg*, 381 U.S. 935; *In re Grand Jury January, 1969*, 315 F. Supp.

662 (D. Md.). But this prosecutorial power is to a large extent created by the Constitution itself; it inheres in the separation of the executive function from the judicial function. Both the executive and judicial branches have independent power, not subject to control by the other, over the course of such proceedings. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 132-135; *The Confiscation Cases*, 7 Wall. 454; *Georgia* v. *Mitchell*, 450 F.2d 1317 (C.A.D.C.); *Powell* v. *Katzenbach*, 359 F.2d 234 (C.A.D.C.), certiorari denied, 384 U.S. 906 (collecting cases). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614.

The federal prosecutor's discretion not to commence criminal prosecution is thus part of our constitutionally-created system of government. It is, of course, conceivable that in particular circumstances prosecutorial discretion will be abused and slanted along racial lines (see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Littleton* v. *Berbling*, 468 F.2d 389 (C.A. 7), vacated on other grounds *sub nom. Spomer* v. *Littleton*, 414 U.S. 514) or other impermissible grounds. When that happens independent remedies are available. However, the prosecutorial discretion, which is a product of the Constitution itself, does not produce unconstitutional results merely because the prosecutor has no precise set of rules that control his prosecutorial decisions. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456.

The prosecution is under a duty—indeed, a constitutional duty—not to charge and prosecute an individual unless the prosecutor legitimately believes that the individual can be convicted. The evaluation of that probability of conviction is a difficult one, involving an assessment of the evidence available, the predilections of witnesses, and the possibility that the jury (the composition of which is unknown) will agree with the prosecutor's evaluation. All of these factual inferences must then be analyzed against the available categories of crime that may be comprehended in a single criminal transaction, and a decision made about which prosecution would be most likely to succeed and would be most advantageous to the public welfare if successful. Finally, the prosecutor must evaluate the resources of his own office; because manpower is limited in relation to the number of crimes that have been committed, decisions sometimes must be made to forego particular prosecutions, even though there is a reasonable chance of conviction, in order to concentrate prosecutorial efforts where they may be more urgently needed.

In many civil law countries prosecutors are under a duty to prosecute all major crimes known to them. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468 (1974). Even within these compulsory prosecution systems the prosecutor remains free to evaluate the evidence; prosecution is commenced only

when there is "a sufficient factual basis."[45] Moreover, the logic of compulsory prosecution is more compelling in an inquisitorial (rather than adversarial) system of criminal justice. In the inquisitorial system the court itself has substantial factfinding and prosecutorial functions; the "prosecutor" is simply an instrument to commence the process, placing further proceedings in the hands of the investigating magistrate. Restriction of prosecutorial discretion is a necessary facet of a system structured around an inquisitorial magistrate, and is simply an allocation of discretion to the magistrate rather than the prosecutor. It certainly is not, at all events, a discretion-free system. Herrmann, *supra*, at 474-503.

2. *Plea Bargaining.*

Although (unlike federal charging discretion) plea bargaining has not been established by the Constitution itself, it is nevertheless an essential part of our system of criminal justice and has received the approval and encouragement of this Court.[46] *Brady* v. *United States*, 397 U.S. 742, 752-753; *Santobello* v. *New York*, 404 U.S. 257, 260. Like the other forms of discretion present in the criminal justice

[45] Federal Republic of Germany, Code of Criminal Procedure 152(2).

[46] Sometimes, as is apparently the case in *Woodson*, a plea bargain with some defendants is absolutely essential to produce the evidence necessary to convict other participants in the crime. See *State* v. *Woodson*, 215 S.E.2d 607, 616-618. Rational selectivity of this sort cannot operate to invalidate the penalty ultimately imposed.

system and assailed by petitioners, plea bargaining reduces the potential punishment a defendant may suffer; it never operates to increase the maximum punishment. Moreover, unlike other forms of discretion, plea bargaining operates only with the acquiescence (and usually at the behest) of the accused and works to the accused's advantage. Were it otherwise, the accused would not enter into the plea arrangement. It is difficult to understand how this procedure, operating with the permission of the accused and for his benefit, can cause the penalty received by those who do not enter into such bargains to be unconstitutional.

The most difficult question raised by plea bargaining is, petitioners assert, the failure of the prosecutor to enter into such bargains with some defendants, thereby depriving those defendants of an opportunity to escape the death penalty.[47] Perhaps a prosecutor might make such a decision for improper motives; in all probability, if such motives could be shown, the procedure would be vulnerable. Cf. *Littleton* v. *Berbling*, *supra*. But petitioners have not even alleged (let alone adduced proof) that such a practice exists in their states. If a prosecutor were bend-

[47] Only one of petitioners has claimed that he offered to plead guilty to a lesser charge and that this request was refused. Petitioner Waxton offered to plead guilty to armed robbery and to being an accessory after the fact to murder. This offer, coming after all of the evidence at trial had been taken, was apparently declined because the evidence showed overwhelmingly that Waxton had committed the murders personally. See *Woodson* Pet. Br. 11-13.

ing his actions in a forbidden manner, it would at most impugn the acts of the prosecutor, and not be an argument against the constitutionality of all death penalties everywhere. Cf. *United States* v. *Bell*, 506 F.2d 207, 221-222 (C.A.D.C.). And, of course, the failure of a prosecutor to accept a plea arrangement suggested by an accused does no more than cause the accused to stand trial—it is simply a failure to relieve a defendant of the burden properly placed on him by the indictment charging a capital offense. Once a prosecution has begun, its continuation is within the control of the court, and discretion in plea bargaining may then to a limited extent be controlled judicially. See, *e.g.*, *United States* v. *Cowan*, 524 F.2d 504 (C.A. 5); *United States* v. *Ammidown*, 497 F.2d 615 (C.A.D.C.); Fed. R. Crim. P. 11(e). If plea arrangement procedures are so seriously defective the proper cure is their improvement, rather than the invalidation of the death penalty for those who do not enter into such arrangements.

3. *Jury Nullification.*

The power of the jury to acquit despite evidence justifying conviction is a power created and protected by the Constitution itself. The Sixth Amendment confers an unquestioned right to a jury trial (*Duncan* v. *Louisiana*, 391 U.S. 145) and that right, together with the Double Jeopardy Clause of the Fifth Amendment, secures to a jury the power to acquit even those whom some all-knowing observer would say were guilty beyond a reasonable doubt.

The jury's function as the "conscience of the community" (*Witherspoon* v. *Illinois*, *supra*, 391 U.S. at 519) is best served when it considers all of the important facets of the crime, including the culpability of the defendant as well as the fact of his legal guilt. See Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Calif. L. Rev. 168 (1972).

On the other hand, the power of a jury to acquit despite the evidence (or to convict of a lesser included offense although the evidence supports the greater offense) is not an exercise of standardless discretion as was the jury's power to recommend, after conviction, whether a defendant shall be sent to death. The jury's power to nullify is a power, but not an authorization. It is a power because society uses no sanctions to deter it. It is a power because the Constitution allows juries to convict or acquit, and establishes no external standards by which an acquittal may be called "improper;" the fact-finding power is lodged in the jury and when it acquits, what it finds to be "true" *is* true within the boundaries of the legal system. But the power of juries to do these things is not unbridled. There are standards to guide the exercise of that power. The judge carefully instructs the jury on the law, and informs jurors how they should respond to the facts they have found. The jury is told that if they have a particular view of the facts, they should take a specific action. They are not told that if they have found (for example) that the accused committed a killing for hire they may convict of first degree murder, second degree

murder, or acquit; they are told, instead, that they should convict of first degree murder. There are multiple standards to guide the jury's decisions; the jury has "discretion" only in the sense that it has the power to disregard these directions."[48]

The potential vice of jury nullification, even though its availability is created by the Constitution, is that the jury may acquit in an irrational or prejudicial manner. However, the constitutional guarantee of a jury trial rests on the assumption that the jury is not animated by bias, and that the jury is capable responsibly of discharging its duties. If the jury is given to caprice, it would undermine convictions for any crime no less than convictions for capital crimes. But this Court has always assumed that, at least when screened from prejudicial pressures and from legally inadmissible but "powerfully incriminating extrajudicial statements" (*Bruton* v. *United States*, 391 U.S. 123, 135), the jury can be trusted to decide the controversy reasonably, conscientiously, and intelligently. See *McGautha, supra.* Cf. *Duncan* v. *Louisiana, supra,* 391 U.S. at 157.

The argument that juries will act unfairly and arbitrarily assumes that, on this most serious decision, twelve jurors who have been carefully screened by defense counsel will silently cast their votes for

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[48] If the instructions given to the jury are vague or defective, the proper recourse is either a claim that the statutes defining the crimes are unconstitutionally vague (see pages 72-73, *supra*) or a claim of simple error in framing the charge.

private reasons without reference to the commands of the law. The available evidence is to the contrary. Professors Harry Kalven, Jr. and Hans Zeisel, in preparing their massive study *The American Jury* (1966), analyzed in depth the workings of more than 3,500 jury trials, and concluded that in the great majority of cases in which the jury declined to convict (whether or not of a capital offense) when the evidence apparently was persuasive, the jury was making a reasoned and reasonable response to the excessiveness of a penalty in light of the nature of the crime and the circumstances of the defendant. The authors uncovered no evidence that the jury was behaving capriciously in these instances of "nullification" (*id.* at 306-312).

We submit that there is simply no evidence that the jury, when deciding whether to convict in capital cases, acts in a wanton or freakish or discriminatory manner. The jury is fulfilling a function given to it by the Constitution itself; more is needed than petitioners' groundless speculation that the jury might act irrationally to demonstrate that the Constitution's guarantee of trial by jury is a bar to the imposition of capital punishment.

4. *Lesser Included Offenses.*

Most of the arguments we have made above with respect to juries also apply to the function of juries as they consider conviction for lesser included offenses. There is no evidence that juries act in a freakish manner; petitioners' assertion of the poten-

tial for such action does not establish that such arbitrary behavior occurs.

Moreover, the Sixth Amendment's right to trial by jury includes within it a constitutional right to have the jury consider any lesser included offenses to the major charge. When the defendant controverts any element of the charge (and defendant's assertion, if correct, would entitle him to conviction on a lesser charge) he is entitled to have that charge put to the jury so that it can exercise its constitutional fact-finding function. *Berra* v. *United States*, 351 U.S. 131, 134; *Stevenson* v. *United States*, 162 U.S. 313. This does not mean, of course, that a defendant is required to accept such a charge; he or she is entitled to submit the case to the jury on the counts of the indictment in the expectation (or hope) of a complete acquittal. And, under federal law, a defendant is not entitled to a lesser included offense instruction unless there is some evidence that would support conviction of that charge.[49] *United States* v. *Bishop*, 412 U.S. 346, 361; *Sansone* v. *United States*, 380 U.S. 343, 350.

There is thus no evidence that juries use their ability to convict of a lesser included offense in a capricious manner. Their ability to convict of a lesser

[49] Some petitioners contend that in their states a lesser included offense instruction may be given even though there is no evidence to support the lesser offense. However, we do not consider this further because it does not apply to the federal system and is not, in any event, an avenue of inherent or inescapable discretion. If it is excessively standardless, it may be assailed directly in an appropriate case.

included offense is in any event created by the Sixth Amendment itself. Petitioners' claim regarding the opportunity for discretion does not make capital punishment invariably cruel and unusual.

5. *Jury Discretion at the Punishment Phase.*

Petitioners Gregg, Jurek and Proffitt were sentenced to death under statutes allowing the judge and jury to exercise some controlled discretion in selecting the punishment appropriate for those convicted of capital crimes. The Antihijacking Act of 1974 (App. C, *infra*) also allows the jury to exercise some discretion. The Antihijacking Act provides that if death results from a hijacking, and if the defendant is convicted of the crime, the factfinder then must consider the penalty to be imposed. Capital punishment is permissible only if the prosecution can prove by a preponderance of the evidence that one of five aggravating factors is present. These factors include: that the defendant previously had been convicted of any crime for which a sentence of life imprisonment or death was imposable, that the defendant previously had been convicted of two felonies involving the infliction of serious bodily injury, that the defendant knowingly created a grave risk of death to at least one person in addition to the person who died, or that the defendant committed the crime in "an especially heinous, cruel, or depraved manner." If the factfinder explicitly determines that one of the aggravating circumstances existed, the defendant must be sentenced to death un-

less the factfinder also determines that a mitigating circumstance exists. The five enumerated mitigating circumstances are: that the defendant was under the age of 18 when he committed the crime, that the defendant's capacity to appreciate the wrongfulness of his conduct was substantially impaired, that the defendant was under substantial duress, that the defendant's participation in a crime primarily committed by another was relatively minor, or that the defendant could not reasonably have foreseen that his conduct would create a grave risk of causing the death of the victim. If the factfinder explicitly determines that one of these mitigating circumstances existed, the defendant must be sentenced to life imprisonment.[50]

There is nothing in the idea of discretion concerning the penalty to be imposed that renders capital

[50] The discretion conferred upon the factfinder by the Antihijacking Act is significantly less than that conferred by the three state statutes before the Court. The Florida statute, which is perhaps most similar to the Antihijacking Act, allows a jury to "balance" aggravating and mitigating factors and allows it to recommend a sentence of death even when it finds a mitigating factor. It does not require explicit findings on the presence of absence of each factor. The judge is free to rebalance the factors and to disregard the jury's recommendation. The Georgia statute allows the death penalty to be imposed only if the jury finds at least one aggravating factor, but it grants the jury complete discretion to recommend mercy, and so to prevent execution. The Texas statute permits the imposition of the death penalty only if three very broadly-worded conditions are satisfied; a jury would have substantial discretion to determine the existence of these conditions.

punishment unconstitutional. This Court already has upheld, as consistent with the Constitution, state statutes that vest absolute discretion in the jury. It wrote: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *McGautha* v. *California*, *supra*, 402 U.S. at 207 (footnote omitted). If absolute discretion is permissible under the Constitution, *a fortiori* discretion that has been structured and confined by statutory standards is consistent with the Constitution.

There is no reason to believe that judges and juries will exercise the discretion thus conferred upon them in arbitrary or freakish ways. Kalven and Zeisel studied the experience under laws committing the decision to the complete discretion of the jury and concluded that when either the judge or the jury had available both a capital disposition and a noncapital disposition [51] they agreed in a remarkable number of cases—81 percent. This indicates that standards are at work behind the decisions. In those cases in which there was disagreement Professors Kalven and Zeisel could find a rational basis for that disagreement in all but two cases. Kalven & Zeisel, *The American Jury* 445 (1966). Perhaps most signifi-

[51] Whether because the jury could determine the sentence or because a jury could convict of a noncapital lesser included offense.

cantly, a clear pattern of aggravation of the worst sort marked those cases in which judge and jury agreed that the death penalty was appropriate.

> The cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness. In many, a clear pattern emerges; there is an aspect of almost gratuitous violence. [*Id.* at 437.]

The other major study of the workings of the modern jury system was conducted by the Standford Law Review. See Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297 (1969). That study, which confined its attention to the penalty phase of sentencing by juries that had convicted the defendant, establishes that the jury makes rational and consistent penalty decisions even in the absence of standards. The authors of the study analyzed 178 separate variables that might have entered into the penalty decision in each of the 238 cases studied. The results, apparently to the surprise of the student editors, showed that there are "definite patterns of jury decisionmaking, precluding the possibility that juries make their decisions wholly at random" (*id.* at 1419). The editors concluded that even without standards presented by the judge, the California juries reached conclusions astonishingly similar to those that would have been produced by an "objective" observer applying the aggravating/mitigating criteria proposed by the Model Penal Code

(*id.* at 1429). This study, like the work of Kalven and Zeisel, demonstrates the propriety of this Court's conclusion in *McGautha* v. *California*, *supra*, 402 U.S. at 207-208, that "[t]he States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision" and that, with or without formal standards, juries consider the appropriate criteria.

Although we therefore believe that the standardless discretion approved by this Court in *McGautha* satisfies all constitutional requirements, it also should be clear that the standards contained in the Antihijacking Act and the state statutes under review provide substantial uniformity in decisionmaking and alleviate any remaining concerns about arbitrariness. Petitioners argue that the standards contained in these statutes are meaningless and that the results their application produces are "freakish." But the entire corpus of the criminal law and administrative law is based upon the premise that rules and standards do make a difference, indeed a vital difference, in many cases. See generally K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969). Standards may not eliminate discretion, but they "canalize [it] within banks that keep it from overflowing." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 551 (Cardozo, J., concurring). The varieties of human experience allow no more, and the Constitution requires no more.

It follows that it makes little constitutional difference whether the factors articulated for the jury's consideration are quite specific (as they are in the federal Antihijacking Act) or are more general (as they are under the Texas statute). But to the extent the degree of generality of the standards is important, the importance relates to the requirements of the Due Process Clause, not to the Eighth Amendment. Petitioners Gregg, Jurek and Proffitt are in effect contending that the standards used in their cases are unconstitutionally vague. But vagueness can be cured by judicial construction or by legislative amendment of defective statutes. Excessively vague statutes can be invalidated without impugning the legislative prerogative to prescribe capital punishment under suitably clear statutes.[52]

Moreover, even if a vagueness challenge to the Georgia, Texas and Florida statutes can be maintained, it "is well established that [such] challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550. A statute is not unconstitutional merely because it may be uncertain in some applications or because it deals with matters of degree. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury

[52] That is the course followed by the Supreme Court of Illinois, which struck down a post-*Furman* statute on the grounds that it was too vague and that it had created a "new court" in violation of the Illinois constitution. *People ex rel. Rice* v. *Cunningham*, 336 N.E.2d 1.

subsequently estimates it, some matter of degree." *Nash* v. *United States*, 229 U.S. 373, 377. The statute can be unconstitutional only if its words describe "no comprehensible course of conduct at all." *United States* v. *Powell*, No. 74-884, decided December 2, 1975, slip op. 5. That is hardly the case here, for such descriptions of human conduct as "deliberately and with the reasonable expectation that the death of the deceased or another would result" and "whether the conduct * * * was unreasonable in response to the provocation," [53] of which petitioner Jurek complains, and similar phrases in the other state statutes, are the staples of the criminal law. They are no less precise than the statutes upheld in *Powell*, *Mazurie*, *Nash* and innumerable other decisions by this Court.[54]

[53] Vernon's Texas Code of Crim. Pro., Art. 37.071(b) (1974).

[54] See, *e.g.*, *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 ("unreasonably low prices"); *United States* v. *Korpan*, 354 U.S. 271, 273, n.2 ("coin operated amusement or gaming device"); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 ("so far as practicable, * * * driving into or through congested thoroughfares"); *Robinson* v. *United States*, 324 U.S. 282 ("liberated unharmed" in kidnapping statute); *United States* v. *Gaskin*, 320 U.S. 527 ("condition of peonage"); *United States* v. *Ragen*, 314 U.S. 513, 517 ("reasonable allowance for salaries"); *Sproles* v. *Binford*, 286 U.S. 374 ("shortest practicable route"); *United States* v. *Alford*, 274 U.S. 264 ("in or near any forest, timber, or other inflammable material"); *Miller* v. *Oregon*, 273 U.S. 657 (explained at 274 U.S. 464-465) (drive a vehicle in "a careful and prudent manner"); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 345, n.3 (any range "usually occupied by any cattle grower").

6. *Clemency.*

We return here to a now familiar theme. At least in the federal system the President's ability to pardon or grant clemency on such terms as he thinks fit is established by the Constitution itself, and thus shielded from legislative or judicial constraint. *Ex parte Garland*, 4 Wall. 333, 380; *Schick* v. *Reed*, 419 U.S. 256. As Hamilton explained in the 74th *Federalist*:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. [p. 473 (Wright ed. 1961).]

In *Schick* this Court concluded that the pardoning power of the President flows from the Constitution alone and therefore may be exercised by him at his will without regard to a need for consistency of decision. "The very essence of the pardoning power is to treat each case individually" (419 U.S. at 265). "Individual acts of clemency inherently call for discriminating choices because no two cases are the same" (*id.* at 268). Because the executive power to grant clemency is unfettered and unfetterable, it cannot logically follow that it is unconstitutional to treat in accordance with a court's judgment those whom the executive declines to pardon.

D. All Discretion Taken Together Does Not Prevent the Death Sentence From Being Validly Imposed

The net effect of the instances of discretion in the criminal justice system is no greater than the sum of its parts. Petitioners' argument is that the Constitution affirmatively provides (or at least permits) so many avenues of escape from death, so many rights the defendant can invoke, and so many opportunities for mercy, each designed expressly to shield an accused from unjust conviction or punishment, that only an arbitrarily or freakishly selected few of those who "really deserve" death escape the net of safeguards against injustice. Then, the argument concludes, it must be unjust to punish those remaining who have not been spared, even though they deserve their fate.

The Constitution does not impose this incredible result on the criminal justice system. Those whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared. Such a procedure is the opposite of arbitrariness. It is instead a decision by consensus—only by unanimous agreement of the grand jury, the prosecutor, the judge, the jury (itself unanimous), and the clemency authority may death be imposed.[55] There

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[55] In the Due Process Clause the framers ensured that the risk of the execution of an innocent man would be held to a minimum. Because the framers themselves authorized capital punishment (1 Stat. 112) and because, as we have argued, the Eighth Amendment does not forbid that type of punishment

is nothing in the Eighth Amendment (or in the Due Process Clause) that precludes such action by consensus. And there is no justification for reaching a conclusion that the combination of provisions, each of constitutional origin, granting discretion to a number of actors, inevitably renders the criminal justice system incapable of producing a constitutional sentence.

In the last analysis petitioners are seeking to convince this Court that the Eighth Amendment cannot coexist with the Fifth and Sixth Amendments, because procedures either compelled or permitted by those amendments, and by other provisions of the Constitution, invariably produce a result intolerable under the Eighth Amendment. But the Constitution is not an instrument so inconsistent within itself that the commands of one amendment nullify the commands of others.

When each step in the process is constitutionally permitted, indeed in many instances compelled, when all that the Constitution required to be done was

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for crime, the framers expressed their belief that the benefits of capital punishment—including protecting the lives of innocent people by deterring murders—outweigh whatever very slight risk there may be of an unwarranted execution. This Court has scrutinized capital cases carefully in order further to minimize that risk. The safeguards and avenues of discretionary mercy we have discussed in this part of the brief stand as a bulwark against the possibility of error that could produce an unjustified execution and, because of the evolution of stronger safeguards in the criminal justice system, it is much less likely today than it was at the time of the framers that such errors will be made.

done, when nevertheless the resulting penalty, although not of a type forbidden, is then claimed to be unconstitutional *because* of the process followed in imposing it—in short, when the foundation of petitioners' argument is exposed, the conclusion built upon it must fall. The course chosen by at least 35 states and the United States since *Furman* should not be nullified by this Court.

CONCLUSION

The United States submits that capital punishment is not *per se* unconstitutional.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

MARCH 1976.

APPENDIX A

Petitioner in *Fowler* relied (Pet. Br. 136, n. 226) upon what he asserted are "discrete and limited but careful studies" demonstrating racial discrimination in the imposition of capital punishment. Petitioner Jurek joins this assertion and relies upon one additional study (*Jurek* Pet. Br. 81-84, nn. 146-147). Petitioner Roberts, although not relying upon the authorities cited in *Fowler*, also contends that there is racial discrimination (*Roberts* Pet. Br. 69).

Most of the studies relied upon reflect experience in southern states during a time when blacks often were excluded from grand and petit juries. Whatever force they may have is diminished by this simple fact. One study finds racial discrimination in rape cases alone. And one study relied upon by petitioners finds *no* evidence of racial discrimination. We examine the studies below.

1. Johnson, *The Negro and Crime*, 217 Annals 93 (1941). Johnson studied the imposition of death sentences in Richmond, Virginia between 1930 and 1939, five counties in North Carolina between 1930 and 1940, and Fulton County, Georgia between February 1938 and September 1939. The Georgia study was fruitless because of insufficient data. In Richmond only one sentence of death was imposed—on a white man. In the North Carolina sample 218 blacks were convicted of murder and 17 (or 7.8%) of them were sentenced to death; 44 whites were convicted of murder and 8 (or 18%) of them were sentenced to death. Of those convicted, whites were therefore

more likely to be sentenced to death than blacks. Of those sentenced to death, 71.6% of the blacks and 69% of the whites were executed; the difference is not statistically significant. Although blacks appeared to be convicted more often than whites, it was not possible within the scope of the study to determine whether this difference was attributable to race, to the nature and frequency of crimes committed, or to other factors. Johnson himself observed that his data were not conclusive.

2. Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 Social Forces 369 (1949). Garfinkel collected data from 10 counties in North Carolina between 1930 and 1940. The study attempted to detect any difference in the penalty assessed for inter-racial murders as opposed to that assessed for intra-racial murders. His data cut two ways: a white convicted of murdering one of his own race was *more* likely (18.6%) than a black convicted of murdering one of his own race (6.7%) to be sentenced to death, while a black convicted of murdering a white was more likely (42.9%) to be sentenced to death than was a white convicted of murdering a black (0%). The net effect of this is unclear, and Garfinkel declined to engage in "sheer speculation" about it (27 Social Forces at 381).

3. Johnson, *Selective Factors in Capital Punishment*, 36 Social Forces 165 (1957). This is not a "study" at all, but simply is a listing of the persons convicted of capital offenses in North Carolina since 1909. The author asserts that race is an important

factor because 73.8% of those sentenced to death are black. He acknowledges, however, that this phenomeon could as easily be explained by differences in the rate in which individuals commit capital crimes (blacks in North Carolina were more likely to be poor, and the poor are more likely to commit violent offenses). Johnson observes that the more recent figures (the 1950s, in his study) reveal a narrowing in the difference between the rate at which the races are sentenced to death.

4. Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. Crim. L. Crim. & Police Sci. 301 (1962). This study concludes that the death sentences of whites are slightly more likely to be commuted than are the sentences of blacks. [This is inconsistent with the results reported in the Johnson study at 217 Annals, *supra.*] However, the authors did not assess the effect of prior criminal record upon the commutation rate, and, if Bedau's study (*infra*) is correct, many apparently racial differences can be explained by differences in the number of prior criminal convictions of those sentenced to death. The authors concede that "too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship" between race and execution rates.

5. Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1 (1964). Bedau analyzed the death sentence in New Jersey using data from 1907 to 1960. He concluded: (1) Because data

establish that blacks commit three to six times as many capital crimes per individual as do whites, no discrimination would be established unless (in New Jersey) more than 65% of all those executed were black. The actual rate of black executions was discovered to be less than this, and, consequently, discrimination was not proved. (2) The only arguable evidence of discrimination was the fact that 17.7% of the whites sentenced to death had their sentences commuted, while only 8.1% of the blacks so sentenced were granted a commutation. Bedau also found, however that this difference becomes statistically insignificant if past criminal record of the offender is accounted for. The author concludes: "No evidence has been found, and no inferences have been drawn from the facts as reported in the course of this study that racial prejudice in the courts or commutation authority has been a proximate cause of the evident differential treatment accorded nonwhites under sentence of death" (19 Rutgers L. Rev. at 53).

6. Wolfgang and Reidel, *Race, Jury Discretion, and the Death Penalty*, 407 Annals 119 (1973). The authors report on a comprehensive study, sponsored by the NAACP, of rape convictions in 11 southern states between 1945 and 1965. The data revealed that among all those convicted of rape, blacks were selected disproportionately for the death sentence. Thirteen percent of all blacks convicted of rape were sentenced to death; two percent of all whites convicted were so sentenced. The study carefully isolated the effects of the age and prior record of the offender, and of numerous characteristics of the victim, offense, and trial. Even after controlling for these effects a substantial portion of the disparity in sentencing was attributable to race. This is a careful and comprehensive study, and we do not question its conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases. See also Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in *Executions in America* 114 (Bowers ed. 1974) (reporting on the same research). The research does not provide support for a conclusion that racial discrimination continues, however, or that it applies to murder cases.

7. Petitioner Roberts refers (*Roberts* Pet. Br. 69) to Professor Wolfgang's assertion that "[t]he evidence of racial discrimination in capital punishment in twentieth century America is * * * hardly contestable." Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in *Executions in America* 114, 117 (Bowers ed. 1974). As we have indicated above, the evidence upon which Professor Wolfgang relies relates to rape cases in the south during a period when blacks often were excluded from grand and petit juries. To the extent the assertion is meant to have a broader meaning, it is a statement exceeding the scope of the study.

8. Some have cited Koeninger, *Capital Punishment in Texas, 1924-1968* 123 (1969), as a study demonstrating that capital punishment is imposed

discriminatorily. Koeninger obtained the available records on 483 Texas cases. He observed that blacks are sentenced to death in disproportionate numbers, and concluded that this indicates racial discrimination. He made no attempt to discover whether this disparity could have been caused by differences in the rate at which capital crimes are committed, and he did not attempt to control for the effects of other variables, such as prior record of the offenders. This study therefore is an inference of discrimination directly from the fact that approximately half of those executed are black. For the reasons we discuss in the text at pages 66-68, *supra*, inferences of this sort are meaningless. A similar problem infects the conclusions of those authors who have inferred discrimination directly from the reported execution data without performing any independent studies. See Alexander, *The Abolition of Capital Punishment*, Proceedings of the 96th Congress of Correction of the American Correctional Association, Baltimore, Maryland 57, 59 (1966); Williams, *The Death Penalty and the Negro*, 67 The Crisis 501 (1960); Hartung, *Trends in the Use of Capital Punishment*, 284 Annals 8, 14-17 (1952); Hockhammer, *The Capital Punishment Controversy*, 60 J. Crim. L. Crim. & Police Sci. 360, 362 (1969).

9. Petitioner Jurek relies upon the assertion of petitioner Fowler (*Fowler* Pet. Br. 136, n. 226) that "it has *seemed apparent* to responsible commissions and individuals studying the administration of the death penalty in this country [that there is discrimination on account of race.]" The responsible individuals to whom this "seemed apparent" conducted no independent research; each of the authorities relied upon what is apparently the received wisdom that discrimination exists. See The President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in A Free Society* 143 (1967); Clark, *Crime in America* 335 (1970). But, as the discussion of the statistical studies cited by petitioners should make clear, the received wisdom is not supported by the data and is open to serious question. The most recent (and most sophisticated) study found no evidence of discrimination in murder cases. Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297, 1346, 1366-1367, 1417-1420 (1969). See also the data collected in respondent's brief in *Aikens* v. *California*, No. 68-5027, October Term, 1971, pages 105-108, which demonstrates that although blacks received 18.6% of the death sentences in California, they were the beneficiaries of 25% of the commutations.

After summarizing most of the studies conducted through 1973, Professor Bowers, an opponent of capital punishment, concluded (Bowers, *Executions in America* 74-75 (1974)): "There are obvious shortcomings in the body of research. The studies are regionally and historically selective. Most states with the death penalty have not been included in any of these investigations * * *. Furthermore, * * * most have failed to test the independence of the racial differences they have uncovered." We agree with this

assessment. But we also agree with Hockhammer, *supra*, 60 J. Crim. L. Crim. & Police Sci. at 362, that even if discrimination were proven, "it would be a mistake to argue that capital punishment should be rejected because some discrimination exists. The proper approach is to remedy the defect, not abolish the system."

APPENDIX B

Petitioners contend that Professor Ehrlich's study of the deterrent effect of capital punishment is open to criticism and consequently should be disregarded by the Court. For the reasons we discuss in the text, we believe that legislatures rather than courts must evaluate the technical merits of empirical studies. We have included this brief discussion of the merits of the debate between Professor Ehrlich and his critics only because of the vehemence of the assault upon his conclusions.

Petitioners have provided the Court with two technical discussions of Ehrlich's work (*Jurek* Pet. Br. App. 2, Sub-apps. C and E). The first is unsigned and the second is an unpublished paper by Passell and Taylor, *The Deterrent Effect of Capital Punishment: Another View* (hereafter Passell & Taylor). Two other criticisms of Ehrlich's work have been published. See Baldus and Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170 (1975) (hereafter Baldus & Cole); Bowers and Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975) (hereafter Bowers & Pierce). Both of these articles conclude that Ehrlich has overestimated the deterrent effects of capital punishment. Ehrlich's work also has been criticized by Yunker, *The Deterrent Effect of Capital Punishment: Comment* (hereafter Yunker), which concludes that errors in Ehrlich's study produce a five-fold underestimation in the

deterrent effect. Ehrlich has responded to most of these criticisms in Ehrlich, *Deterrence: Evidence and Inference*, 85 Yale L.J. 209 (1975) (hereafter Ehrlich's reply). Jon K. Peck, an assistant professor of economics at Yale, agrees in part with Ehrlich and in part with his critics. Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 Yale L.J. 359 (1976) (hereafter Peck).

Ehrlich's critics have made four major arguments that, they contend, undercut the force of his conclusions. First, they argue that multiple regression analysis is unreliable. Second, they contend that Ehrlich used deficient data. Third, they believe that Ehrlich should not have included the post-1960 years in his study. Finally, they challenge Ehrlich's use of a logarithmic specification for some of his equations. We discuss these arguments in turn.

1. Petitioners contend (*Jurek* Pet. Br. App. 2, Sub-app. C) that Professor Ehrlich's conclusions should be disregarded because "regression analysis is an exceptionally brittle tool of limited usefulness if conditions make it impossible to validate regression results with controlled experimentation" (*id.* at 2-44; footnote omitted). It is not possible to perform "controlled experimentation" on the death penalty; therefore, the argument concludes, regression analysis is "especially dangerous" (*ibid.*). See also Baldus & Cole.

We do not dispute the observation that linear regression analysis is quite sensitive to the identification of the potentially explaining factors that are

thought to be the independent variables and to the specification of the mathematical relationship among them. Great care must be taken both to identify all of the relevant variables (in this case, all of the potential causes of a change in the murder rate) and to ensure that the apparently "independent" variables explain the dependent variable (murder) rather than each other. It is often difficult to achieve a certain explanation in the absence of "experimental" evidence, because only with a number of test sets of data to explore is it possible to reject with complete confidence a spurious covariance between the observed changes in the independent and dependent variables.

It is sometimes possible, however, to verify regression results by using the same specification to attempt to explain subsets of the available data. Professor Ehrlich has done so and reports that these results confirm his original findings. Ehrlich's reply, 85 Yale L.J. at 217. Bowers & Pierce applied Ehrlich's method to a slightly different data base and obtained results similar to Ehrlich's, also confirming Ehrlich's original findings. Bowers & Pierce, 85 Yale L.J. at 196; Ehrlich's reply, 85 Yale L.J. at 210.

Moreover, in evaluating the weight to be given to findings of linear regression analysis, it is necessary to consider not only the pitfalls of the linear regression but also the defects of alternative methods. All things considered, it is the consensus of statisticians and econometricians that regression analysis is the most powerful statistical tool available for testing

and evaluating competing explanations of observed variance in specific events. See generally Wonnacott and Wonnacott, *Econometrics* 1-9 (1972); Eaton, *Multivariate Statistical Analysis* (1972); Snedecor and Cochran, *Statistical Methods* (6th ed. 1967); Ezekiel and Fox, *Methods of Correlation and Regression Analysis* (3d ed. 1959); Draper and Smith, *Applied Regression Analysis* (1966). It is the statistical method of choice whenever there are enough observations to make its use feasible. See also Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442 (1973); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 Harv. L. Rev. 387 (1975) (collecting cases).

Alternative methods, such as the "matched pairs of states" method advocated by Sellin, produce results that are completely unreliable. See the analysis of these methods at pages 39-43 of our brief. See also Ehrlich's reply, 85 Yale L.J. at 222-224; Peck, 85 Yale L.J. at 364-365 ("The matching approach has its own set of difficulties. It imposes relatively little explicit structure on the problem and is perhaps less likely than the econometric approach to find effects which are weak. The fundamental problem, however, is that the data are not generated in a controlled experiment. In making matched pairwise comparisons, the choice of pairs is inevitably subjective. * * * Even if states are correctly matched in terms of the averages of all relevant variables, other differences may be important. For example, of two states with

the same average permanent income, one may have a much greater proportion of low income families than the other. If low income families were disproportionately responsible for homicides, the pairing of the two would be inappropriate. * * * A final difficulty is the possible response of punishment policies to homicide rates. For example, if high or rising homicide rates led states to institute the death penalty and low or declining rates led states to abolish the penalty, retentionist states would tend to have higher homicide rates. * * * The paired-comparison approach cannot adequately separate [all of the competing] effects, and consequently could fail to yield evidence of an underlying deterrent relationship."). Only regression analysis is capable of isolating the effects of a large number of variables, all of which may make some contribution to the murder rate. Only after that has been done is it possible to determine what role the death penalty plays in influencing the number of serious crimes. Regression analysis must be used with care, but it, unlike the paired-state method, is at least capable of providing a meaningful answer if properly applied.

2. Bowers & Pierce (and, to some extent, the other critics) argue that Ehrlich has used inadequate data, and therefore that his results are open to question. They point out that the early years of data collected by the Uniform Crime Reporting System are not accurate (Bowers & Pierce, 85 Yale L.J. at 187-192).

This criticism is, to a point, well taken. The data from the 1930s and 1940s are not entirely reliable,

as the Uniform Crime Reports expressly concede. But this argument also discredits the earlier studies that do not find a deterrent effect. Although many of those studies relied upon data sources other than the Uniform Crime Reporting System, those sources, too, are not fully accurate. In addition, reliance on them would lead to errors of a different sort. The Census Bureau Vital Statistics data, for exemple, aggregates all homicides, while the Uniform Code data separates willful felonious homicides (which are likely to be capital crimes) from negligent manslaughters (which are not). See generally Ehrlich's reply, 85 Yale L.J. at 212-214. What is more, any random errors in the data from the 1930s and 1940s would, in all likelihood, produce an underestimation in the deterrent value of capital punishment. See Ehrlich's reply, 85 Yale L.J. at 213; Peck, 85 Yale L.J. at 366; Ehrlich, *Rejoinder*, 85 Yale L.J. 368 (1976).

3. Passell & Taylor and Bowers & Pierce contend that Ehrlich should not have included the post-1960 years in his observations. They argue that if those years are deleted from the study the estimated deterrent effect disappears; they suggest that whenever a regression analysis spans a large number of years, there is a risk that social changes during those years will affect the relationship among the variables, so that the factors explaining murder committed at the beginning of the period will not do so (or will do so in a different way) at the end of the period.

This argument is not without its force. Yunker, too, argues that social changes in the 1950s make a

continuous analysis inappropriate. But, as Yunker points out, if the 1960s are studied in isolation, a rapid decrease in the number of executions actually carried out is associated with a rapid increase in the murder rate. A study of that period alone led Yunker to conclude that each execution may have deterred 50 murders.

As Peck indicates (85 Yale L.J. at 367, n. 27) Ehrlich probably would disagree with Yunker, just as he has disagreed with Sellin and with Bowers & Pierce. Ehrlich has argued that the inclusion of the 1960s in his study was necessary for two reasons: to obtain a sample of executions and murders of sufficient size that a statistical study yields reliable results, and to include a number of years when the execution rate was changing rapidly. Ehrlich's reply, 85 Yale L.J. at 214-217. Because the execution and murder rates were either stable or changing only slowly in the 1930s and 1940s, a regression performed upon those decades alone would not have been reliable.

There are alternative explanations for the sudden surge in the number of murders in the 1960s. In one explanation, favored by Ehrlich and Yunker, the decrease in the number of executions plays some role. In the other, favored by Bowers & Pierce, changes in other social factors are so extensive they alone produce the increase. Professor Peck believes that we cannot know who is right until studies are performed on "disaggregated" data—studies for individual states, for particular spans of years different from those used by Ehrlich, and so on. Those studies are now under way.

4. Ehrlich used a logarithmic format for some of his calculations. Baldus & Cole, Bowers & Pierce, and Passell & Taylor all contend that if Ehrlich had used natural numbers his analysis would not have demonstrated a deterrent effect for the death penalty. This is primarily so, the critics explain, because in a logarithmic format the effect of reducing the execution rate close to zero in some years is given a disproportionate weight. Passell & Taylor attempted to duplicate Ehrlich's results with natural numbers and found no observable deterrent.

On the other hand, Yunker used natural numbers and estimated a deterrent effect much larger than that estimated by Ehrlich. Ehrlich himself contends (Ehrlich's reply, 85 Yale L.J. at 217-219) that use of the logarithmic format was preferable for various reasons too technical to be explained here; moreover, he argues, he has performed regressions using natural numbers and has observed a deterrent effect. He attributes the contrary conclusions of Bowers & Pierce, and of Passell & Taylor, to basic statistical errors. Ehrlich's reply, 85 Yale L.J. at 219-221, 225, n. 48. Peck agrees with Ehrlich that his critics have committed basic statistical errors (Peck, 85 Yale L.J. at 367) and observes that neither the logarithmic form nor the natural number form "is likely to be exactly right, but only an approximately correct shape for the function is needed" (*id.* at 361). Once more, Peck suggests that additional work is necessary before we can know whether Ehrlich or his critics have the better of the argument.

APPENDIX C

The Antihijacking Act of 1974, Pub. L. 93-366, 88 Stat. 409, 410-413, amending 49 U.S.C. (Supp. IV) 1472 and 1473, provides in relevant part:

Section 1472:

* * * * *

(i) Aircraft piracy.

(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.

* * * * *

(n) Aircraft piracy outside special aircraft jurisdiction of the United States.

(1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) A person commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he—

(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(B) is an accomplice of a person who performs or attempts to perform any such act.

(3) This subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft.

(4) For purposes of this subsection an aircraft is considered to be in flight from the mo-

ment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard.

* * * * *

Section 1473:

* * * * *

(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 1472(i) or 1472(n) of this title only if a hearing is held in accordance with this subsection.

(2) When a defendant is found guilty of or pleads guilty to an offense under section 1472 (i) or 1472(n) of this title for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraphs (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if—

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury; or

(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy

of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

(4) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in paragraph (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7).

(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

(6) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that at the time of the offense—

(A) he was under the age of eighteen;

(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was

significantly impaired, but not so impaired as to constitute a defense to prosecution;

(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

(D) he was a principal (as defined in section 2(a) of Title 18) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

(B) the death of another person resulted from the commission or attempted commission of the offense, and—

(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a

sentence of life imprisonment or death was imposable;

(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of serious bodily injury upon another person;

(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or

(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.

APPENDIX D

The Department of Justice and the President have supported proposals to amend the federal criminal laws to reintroduce a death penalty in certain carefully circumscribed circumstances. Chapter 24 of S. 1, 94th Cong., 1st Sess., would accomplish that goal. Chapter 24 provides in relevant part:

§ 2401. Sentence of Death

(a) In General.—Except as otherwise provided in subsection (b), a defendant who has been found guilty of a Class A felony under section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1601 (Murder), shall be sentenced to death if:

(1) the offense is under section 1101 (Treason), 1111 (Sabotage), or 1121 (Espionage) and:

(A) the defendant has been convicted of another offense involving treason, sabotage, or espionage, committed before the time of the offense, for which a sentence of life imprisonment or death was authorized;

(B) the defendant, in the commission of the offense, knowingly created a grave risk of substantial impairment of the national defense; or

(C) the defendant, in the commission of the offense, knowingly created a grave risk of death to any person; or

(2) the offense is under section 1601 (Murder) and:

(A) the defendant committed the offense during the commission of an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), 1313(a)(1) (Escape), 1621 (Kidnapping), 1631 (Aircraft Hijacking), or 1701 (Arson);

(B) the defendant has been convicted of another federal offense, or a state offense involving the death of a person, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was authorized;

(C) the defendant has previously been convicted of two or more federal or state felonies, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

(D) the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim of the offense;

(E) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

(F) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

(G) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or

(H) the defendant committed the offense against:

(i) the President, or a potential successor to the presidency as defined in section 1359(a)(1)(C);

(ii) the chief of state, or head of government, or the political equivalent, of a foreign power;

(iii) a foreign dignitary who is in the United States on official business; or

(iv) a federal public servant who is a United States official, a law enforcement officer, or an employee of an official detention facility; or who is outside the United States for the purpose of performing his official duties; and who is killed while engaged in the performance of his official duties, or because of an official action taken or to be taken or a legal duty performed or to be performed by him, or because of his status as a public servant.

(b) Imposition Precluded.—Notwithstanding the existence of one or more of the factors set forth in subsection (a)(1) or (a)(2), the court shall not sentence the defendant to death if, at the time of the offense:

(1) the defendant was less than eighteen years old;

(2) the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution;

(3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution;

(4) the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor;

(5) the defendant could not reasonably have foreseen that his conduct in the course of the murder for which he was convicted would cause, or would create a grave risk of causing, death to any person; or

(6) the defendant:

(A) in addition to committing the murder for which he was convicted, also committed an offense described in section 1621 (Kidnapping) or 1631 (Aircraft Hijacking);

(B) subsequently was assured by the Attorney General personally that the sentence of death would not be authorized for the murder if he released alive all hostages he then held; and

(C) subsequently, in reliance on the assurance by the Attorney General and in accordance with the conditions upon which such assurance was made, released alive all hostages he held at the time of such assurance.

§ 2402. Procedure to Determine Applicability of Sentence of Death

(a) Separate Sentencing Hearing.—The court shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in section 2401(a)(1) or (a)(2) and section 2401(b), unless the government stipulates that none of the factors set forth in section 2401(a)(1) or (a)(2) exists or that one or more of the factors set forth in section 2401(b) exists. The hearing shall be conducted:

(1) before the jury that determined the defendant's guilt;

(2) before a jury impanelled for the purpose of the hearing if:

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt has been discharged by the court for good cause; or

(D) review by a court of appeals of the original sentence to death has resulted in a remand for resentencing under this chapter; or

(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the government.

(b) Evidence and Argument.—At the sentencing hearing the court shall disclose to the defendant or his counsel all material contained

in the presentence report, if one has been prepared, except such material as the court determines is required to be withheld to protect human life or to avoid impairment of the national defense. Any information in the presentence report that is withheld from the defendant and his counsel shall not be considered in determining the existence of the factors set forth in section 2401(a)(1) or (a)(2) or the nonexistence of the factors set forth in section 2401(b). Any information relevant to any of the factors set forth in section 2401(a)(1) or (a)(2) may be presented by either the government or the defendant, if admissible under the rules governing the admission of evidence at criminal trials. Any information relevant to any of the factors set forth in section 2401(b) may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The government and the defendant shall be given fair opportunity to rebut any information received at the hearing, and to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in section 2401(a)(1) or (a)(2) and section 2401(b).

(c) Proof.—The burden of establishing the existence of any of the factors set forth in section 2401(a)(1) or (a)(2) is on the government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any of the factors set forth in section 2401(b) is on the defendant, and is not satisfied unless established by a pre-

ponderance of the evidence. The factors set forth in section 2401(b) shall be liberally construed.

(d) Special Verdict.—The jury, or if there is no jury, the court, shall return a special verdict setting forth its findings as to the existence or nonexistence of the factors set forth in section 2401(a)(1) or (a)(2) and section 2401(b).

(e) Sentence.—If the jury or, if there is no jury, the court finds:

(1) that one or more of the factors set forth in section 2401(a)(1) or (a)(2) exists, and that none of the factors set forth in section 2401(b) exists, the court shall sentence the defendant to death;

(2) that none of the factors set forth in section 2401(a)(1) or (a)(2) exists, or that one or more of the factors set forth in section 2401(b) exists, the court shall not sentence the defendant to death but shall impose any other sentenced authorized for a Class A felony under the provisions of section 2001.

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